

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to Chapter 3-122
Hawaii Administrative Rules

June 21, 1999

SUMMARY

1. §3-122-45 is amended.
2. §3-122-81 is amended.
3. Chapter 3-122 Exhibit A is amended.
4. Chapter 3-122 Exhibit B is amended.

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-122
Hawaii Administrative Rules
October 14, 1997

SUMMARY

1. §3-122-1 is amended.
2. §3-122-3 is amended.
3. §3-122-9 is amended.
4. §§3-122-9.01 and 3-122-9.02 are added.
5. §3-122-13 is amended.
6. §§3-122-19 to 3-122-22 are amended.
7. §3-122-24 is amended.
8. §§3-122-26 and 3-122-27 are amended.
9. §§3-122-29 to 3-122-31 are amended.
10. §3-122-33 is amended.
11. §3-122-35 is amended.
12. §§3-122-42 and 3-122-43 are amended.
13. §3-122-44 is repealed.
14. §§3-122-45 and 3-122-46 are amended.
15. §3-122-47 is repealed.
16. §§3-122-48 to 3-122-52 are amended.
17. §§3-122-54 and 3-122-55 are amended.
18. §§3-122-57 to 3-122-59 are amended.
19. §3-122-62 is repealed.
20. §§3-122-64 to 3-122-68 are amended.

21. §§3-122-74 to 3-122-77 are amended.
22. §§3-122-81 and 3-122-82 are amended.
23. §3-122-84 is amended.
24. §3-122-88 is amended.
25. §§3-122-90 and 3-122-91 are amended.
26. §3-122-96 is amended.
27. §§3-122-102 and 3-122-103 are amended.
28. §3-122-104 is repealed.
29. §3-122-108 is amended.
30. §3-122-110 is amended.
31. §3-122-124 is amended.
32. §3-122-133 is amended.
33. §3-122-135 is amended.
34. §§3-122-137 and 3-122-138 are amended.
35. §§3-122-143 to 3-122-145 are amended.
36. §3-122-147 is amended.
37. §3-122-149 is amended.
38. §3-122-155 is amended.
39. §§3-122-167 to 3-122-169 are amended.
40. §§3-122-175 to 3-122-179 are amended.
41. §3-122-182 is added.
42. §§3-122-183 to 3-122-185 are reserved.
43. §3-122-186 is amended.

44. §3-122-196 is amended.

45. §3-122-211 is amended.

46. §§3-122-221 to 3-122-224 are amended.

47. §§3-122-226 to 3-122-228 are amended.

48. Chapter 3-122 Exhibit A titled "Procurement
Approved For Competitive Sealed Proposals" is
added.

49. Chapter 3-122 Exhibit B titled "Procurements
Approved For Sole Source" is amended.

HAWAII ADMINISTRATIVE RULES

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SUBCHAPTER 1

DEFINITIONS

§3-122-1 Definitions. As used in this chapter:

"Alternative procurement method" means a procurement method used due to a waiver from the competitive sealed bids or proposals process when one or no responsive and responsible offer is received.

"Bid sample" means a sample to be furnished by a
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bidder to show the characteristics of the item offered in the bid.

"Brand name specification" means a specification limited to one or more items by manufacturers' names or catalogue numbers, commonly referred to as a restrictive specification.

"Brand name or equal specification" means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet requirements, and which provides for the submission of equivalent products.

"Capability" means capability at the time of award of contract.

"Chief financial officer" means, depending upon the purchasing agency, either the comptroller, a county's director of finance, or the respective chief financial officers of the University of Hawaii, the department of education, the judiciary, or the legislative branches of the State or county.

"Contract price" means the amount designated on the face of the contract for the performance of the work including allowances for extras; if any.

"Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the State to consider whether the item meets its needs.

"Design specifications" means the dimensional and other physical requirements of the item being purchased, how a product is to be fabricated or constructed.

"Discussion" means an exchange of information or other manner of negotiation during which the offeror and the State may alter or otherwise change the conditions, terms, and price of the proposed offer. Discussion may be conducted in connection with request for proposals, sole source, and emergency procurement; discussions are not permissible in competitive sealed bidding, except to the extent permissible in the first phase of multi-step sealed bidding to determine the acceptability of technical offers.

"Formal bid or proposal" means legally advertised, invitation for bids or request for proposals where the expenditure is \$25,000 or more for goods, services, or construction and award is by a formal written contract.

"Opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step

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sealed bidding, or receipt of proposals in competitive sealed proposals.

"Performance specifications" means the functional or performance requirements of the item, what a product does and how well it performs.

"Practicable" and "Advantageous" shall be given ordinary dictionary meanings. "Practicable" means what may be accomplished or put into practical application.

"Advantageous" means a judgmental assessment of what is in the State's best interest. The use of competitive sealed bidding may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in the State's best interest.

"Professional services" means those services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, public finance bond underwriting, public finance bond investment banking, or any other practice defined as professional pursuant

to section 415A-2, HRS, or the professional and scientific occupation series contained in the United States Office of Personnel Management's Qualifications Standards Handbook. A list of professional and scientific positions from the handbook shall be provided by procurement directive.

"Qualified products list" means an approved list of goods, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the State has determined will meet the applicable specification requirement.

"Quotation" means a statement of price, terms of sale, and description of goods, services, or construction offered by a prospective seller to a prospective purchaser, usually for purchases below the amount requiring formal bidding.

"Request for information" means a formal written request publicized pursuant to §3-122-24(c), or an informal written, oral, or electronic media request, or a combination of formal and informal requests, for soliciting information to obtain recommendations from suppliers for a procurement that cannot be described in sufficient detail to prepare a solicitation.

"Specification for common or general use item" means a specification which has been developed and approved for repeated use in procurements, as in the case of price list items.

"Specifications" means any description of the
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physical or functional characteristics, or of the nature of a good, service, or construction item. The term includes descriptions of any requirement for inspecting, testing, or preparing a good, service, or construction item for delivery.

"Standard commercial product" means a product or material, in the normal course of business, is customarily maintained in stock or readily available by a manufacturer, distributor, or dealer for the marketing of the product. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §§103D-104, 103D-202)

SUBCHAPTER 2

GENERAL PROVISIONS

§3-122-2 Extension of time for acceptance of offer received in response to a solicitation. After opening offers, the procurement officer may request offerors to extend the time during which the State may accept their offers, as stated in the terms and conditions of the solicitation, provided that, with regard to competitive sealed bids, no other change is permitted. The reasons for requesting the extension shall be documented. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-3 Extension of time on contracts. (a) If a contract has exhausted its provision for extension(s) of time of performance, or if the contract does not include a provision for extension(s) of time of performance, the contract may be extended upon approval of the chief procurement officer, provided:

- (1) The period of each extension is for one hundred eighty calendar days or less;
- (2) The procurement officer makes a written determination that it is not practical to award another contract at the time of the expiration of the contract for reasons to include but not be limited to the following:
 - (A) A new contract cannot be executed by the time the contract expires; or
 - (B) The need for the good or service is

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short term;

- (3) All parties agree to the extension of time of performance; and
- (4) The price(s) or conditions of the contract remain the same as the original contract, or as amended per the contract; or if not the same or as amended, they are fair and reasonable.

(b) If paragraph (2) of subsection (a) is met, but paragraph (3) or (4) of subsection (a) or both are not met and the procurement officer determines in writing that the need for the good or service continues, provided subchapters 8, 9, and 10 do not apply, the chief procurement officer, may upon request

in writing, approve an alternative procurement method, including but not limited to direct negotiations with a party other than the contractor, subject to the maximum one hundred eighty calendar day contract period.

(c) This section shall not apply to adjustments in performance time under chapter 3-125. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-4 Multiple or alternate offers. (a) Unless multiple or alternate offers are specifically provided for, the solicitation shall state that multiple or alternate offers shall not be accepted.

(b) When prohibited, multiple or alternate offers shall be rejected, provided that if an offeror clearly indicates a primary offer, it shall be considered for award as though it were the only offer submitted by the offeror.

(c) This section shall be set forth in the solicitation, and if multiple or alternate offers are allowed, it shall specify their treatment. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-5 Procuring state-produced goods, services, or construction. Using agency requirements may be fulfilled by procuring goods, services, or construction performed by the State's own programs, such as Ho'opono workshop and correctional industries, pursuant to chapter 3-128. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-6

§3-122-6 Conditioning offers upon other awards not acceptable. Any offer which is conditioned upon receiving award of both the particular contract being solicited and another state contract shall be deemed nonresponsive and not acceptable. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-7 Determination of contractual terms and conditions. The chief procurement officer or the head

of a purchasing agency is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts, provided the provisions, terms, and conditions are not contrary to statutory or chapter 91 administrative rule requirements governing the procurement. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-8 Purchase of items separately from construction contract. The chief procurement officer or the head of a purchasing agency is authorized to determine whether a good item or group of good items shall be included as part of, or procured separately from, any contract for construction. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-9 Use of facsimiles. (a) Copies of documents transmitted by vendors via facsimile machine shall be limited to the notice of intention to offer; the offer; and modifications or withdrawal of offers, pursuant to subsections (b) and (c).

(b) Notices of intention to submit an offer and modifications or withdrawal of an offer may be by facsimile machine pursuant to sections 3-122-108 and 3-122-28, respectively.

(c) An offer transmitted via facsimile machine shall be acceptable only when specifically allowed in the invitation for bids or request for proposals, provided:

- (1) The facsimile offer is received in hand at the designated office by the time and date set for receipt of offers; and
 - (2) The facsimile offer contains:
 - (A) The identification number of the
- §3-122-9.02

invitation for bids or request for proposals;

- (B) The item;
- (C) The quantity;
- (D) The price for the offer;
- (E) All pages of the offer requiring an original signature;
- (F) The bid bond, if required; and

(G) A signed statement that the offeror agrees to all the terms, conditions, and provisions of the invitation for bids or request for proposals.

(d) If the facsimile offer is the lowest responsive bid, the bidder must submit the complete original offer, with the original bid bond, if required, so that it is received within two working days from the time and date set for receipt of offers. If the bidder fails or refuses to comply with this requirement, the procurement officer has the option to either accept the offer based upon the facsimile proposal, or reject the offer. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-303, 103D-310) (Imp: HRS §§103D-302, 103D-303, 103D-310)

§3-122-9.01 Disclosure of names of potential offerors. (a) A purchasing agency is not required to disclose the records identifying the organization or persons that obtained a solicitation; or attended a pre-offeror's conference; or submitted a notice of intent to offer or an offer itself until:

- (1) The purchase order is issued, in the case of small purchase requests for quotations;
- (2) The deadline for receipt and opening of bids, in the case of invitations for bids; and
- (3) After the contract has been awarded, in the case of requests for proposals.

(b) In the case of procurement of professional services, the list of qualified persons provided to the head of the purchasing agency shall not be made public until after the contract is signed by all parties. [Eff and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-9.02 Request for information; formal or informal or both. When it is considered impractical to

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initially prepare a definitive purchase description or when informal discussions with offerors are not productive, the procurement officer may, prior to issuing a competitive sealed bid or proposal, issue:

- (1) A formal written request for information which shall include, but not be limited to:
 - (A) The objective of the procurement;
 - (B) That the response is to provide the purchasing agency with recommendations that will serve to accomplish the work required by the procurement;
 - (C) That the purchasing agency reserves the right to incorporate in a solicitation, if issued, any recommendations presented in the response to the request for information; and
 - (D) That neither the purchasing agency nor the supplier responding has any obligation under the request for information; or
- (2) An informal written, oral, or electronic media request to obtain information for a solicitation; or
- (3) A combination of formal and informal requests. [Eff and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-303)

SUBCHAPTER 3

SPECIFICATIONS

§3-122-10 Purpose. A specification is the basis for procuring a good, service, or construction item adequate and suitable for the State's needs in a cost effective manner. Purchasing agencies shall seek to procure standard commercial products, if practicable, and obtain the most advantageous prices. All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-405)

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§3-122-11 Authority to prepare specifications.

(a) The chief procurement officer, with the assistance of the using agency, shall prepare and approve specifications, and may delegate, in writing, to purchasing or using agencies the authority to prepare and use its own specifications, provided the delegation may be revoked by the chief procurement officer.

(1) The written delegation shall include a determination made by the chief procurement officer that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the State.

(2) Using agencies delegated the authority to prepare specifications may use any of the specifications defined herein.

(b) If a specification for general or common use item or a qualified products list exists for an item to be procured under subchapter 8, for small purchases, it shall be used. If no specification exists, purchasing agencies are hereby granted the authority to prepare specifications for use in such purchases.

(c) In an emergency under subchapter 10, any necessary specifications may be utilized by the purchasing agency without regard to the provisions of this subchapter. [Eff 12/15/95; comp NOV 17 1997]
(Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-402)

§3-122-12 Duties of the administrator.

(a) The administrator of the state procurement office shall serve as the central procurement officer to coordinate, guide, and distribute specifications used by purchasing agencies, including specifications on recycled products. This effort will allow for the use of standard specifications by purchasing agencies on purchases for common or general use items or standard commercial products.

(b) The administrator of the state procurement office shall review and establish purchase specifications to guide state and county purchasing agencies in the procurement of recycled products.

(1) The specifications shall:

(A) Be consistent with applicable current federal specification standards on recycled products incorporated in Presidential Executive Orders No. 12873, dated October 20, 1993, and any

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- subsequent amendments to that order;
 - (B) Include minimum standards of recovered material and postconsumer content; and
 - (C) Ensure, to the maximum extent economically feasible, the purchase of materials which may be recycled or reused when discarded and avoid the purchase of products deemed environmentally harmful.
- (2) The administrator shall periodically review its specifications to determine whether discrimination against procured goods with recycled content exists and shall revise these specifications to eliminate any discrimination.
- (3) Purchase specifications shall include, but not be limited to, office paper, printed material, paper products, paper, glass-by-products, plastic products, mulch and soil amendments, tires, batteries, oil, paving materials and base, subbase, and pervious backfill materials. Paving materials to be considered shall include, but are not limited to, asphalt, tires, crushed concrete for base, subbase, and paving materials. The standards and specifications shall provide for the use of recycled materials and shall not reduce the quality standards for any product or construction. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §103D-401)

§3-122-13 Development of specifications. (a) A specification should provide for the following:

- (1) Identify minimum requirements;
- (2) Allow for a competitive bid;
- (3) List reproducible test methods to be used in testing for compliance with specifications; and
- (4) Provide for an equitable award at the lowest possible cost.

(b) Types of specifications include the following, and may be used in combination when developing the specification:

- (1) Design specification sets the requirements for the product, detailing the

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characteristics that the item must possess, how the item is to be manufactured;

- (2) Performance specifications describes the capabilities that the product must meet, use of test or criteria are developed to measure the item's ability to perform as required;
- (3) Brand name specification commonly referred to as restrictive specifications, may be used upon approval of the chief procurement officer after the purchasing agency makes a written determination that only the identified brand name item will satisfy the state's needs, and it is not practicable to use a less restrictive specification;
- (4) Brand name or equal specification cites one or more brand names, model numbers, or other designations that identify the specific products as having the characteristics of the item desired; and
- (5) Qualified or pre-approved products list is a list of goods, services, or construction items, which, prior to the opening of the competitive solicitation, are examined, tested, and determined to meet the applicable specification requirements.

(c) To the extent practicable, the State may procure standard commercial products using accepted commercial specifications. Specifications shall emphasize functional or performance criteria which do not discriminate against the use of recycled materials.

(d) The using agency shall submit advice and assistance in the development of specifications or plans pursuant to a request from the purchasing officer.

(e) A contractor paid for services to develop or prepare specifications or work statements shall be precluded from submitting an offer or receiving a contract for that particular solicitation.

(f) Specifications prepared by architects, engineers, consultants and others for public contracts, shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the

State's needs and shall not be unduly restrictive.
[Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS
§§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-404,
103D-405, 103D-406)

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§3-122-14 Exempted items. Purchasing agencies are granted the authority to prepare specifications for goods, services, and construction procured under sections 103D-102 and 103D-304, HRS. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-403) (Imp: HRS §§103D-102, 103D-304, 103D-403)

§3-122-15 (Reserved).

SUBCHAPTER 4

METHODS OF SOURCE SELECTION

§3-122-16 Methods of source selection. Unless authorized by law, all contracts shall be awarded by competitive sealed bidding pursuant to subchapter 5, except as provided in:

- (1) Subchapter 6 - Competitive sealed proposals;
- (2) Subchapter 7 - Professional services procurement;
- (3) Subchapter 8 - Small purchases;
- (4) Subchapter 9 - Sole source procurements; and
- (5) Subchapter 10 - Emergency procurements. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-301)

SUBCHAPTER 5

COMPETITIVE SEALED BIDDING

§3-122-17 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed bidding method of source selection. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-18 Applicability. These rules shall apply to every procurement made by competitive sealed bidding pursuant to chapter 103D, HRS, including single and multi-step sealed bidding. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

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§3-122-19 Dollar thresholds for competitive sealed bids. Expenditures \$25,000 or more for goods , services, or construction shall be made pursuant to this subchapter, except as provided in subchapters 6, 7, 9, and 10. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-20 Conditions for use. (a) Unless otherwise authorized by law, contracts shall be awarded by competitive sealed bidding, except as provided in subchapters 6, 7, 8, 9, and 10.

(b) The competitive sealed bidding method shall not include discussions with bidders after the receipt and opening of bids, except as provided for in section 3-122-22. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §§103D-301, 103D-302)

§3-122-21 Preparing a competitive sealed bid. (a) The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include:

- (1) Instructions and information to bidders concerning the bid submission requirements, including:
 - (A) The time and date set for receipt of bids;
 - (B) The address of the office to which bids are to be delivered;
 - (C) The maximum time for bid acceptance by the procurement officer issuing the bid; and
 - (D) Any other special information, such as any requirement of intention to bid.

The time, date, and location of the receipt of bids and the bid opening shall be the same.

- (2) The purchase description or specifications, evaluation factors, delivery or performance schedule, and inspection and acceptance requirements as are not included in the purchase description.
- (3) The contract terms and conditions, including but not limited to the following, as applicable:
 - (A) Tax clearance requirements pursuant to chapter 103D, HRS;

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- (B) Warranty requirement;
 - (C) Bonding or other security requirements pursuant to subchapter 24;
 - (D) Contract extension provisions; and
 - (E) Statement that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the invitation for bids.
- (4) A bid form which shall include space for, but not limited to, the following:
 - (A) Bid price;
 - (B) Brand name and model number and packaging for goods; and
 - (C) Information on applicable preferences.
- (5) A requirement that the bidder shall sign the bid form in ink and submit the bid form with the original signature included in the offer.
- (6) Documents by reference, provided that the invitation for bids specifies where the documents can be obtained.
- (7) A statement that bidders shall designate those portions of their offer that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-30(c) and (d); and that the material designated as confidential shall be

readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.

- (8) For construction projects the bidder shall provide:

- (A) The name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract; and
- (B) The nature and scope of the work to be performed by each.

Construction bids that do not comply with the above requirements may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or

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subcontractor is equal to or less than one percent of the total bid amount.

- (9) A statement that bidders shall designate those portions of their offer that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-30(c) and (d); and that the material designated as confidential shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.

(b) The terms, requirements and conditions set out in an invitation for bids, including the specifications appended or incorporated by reference therein, may be altered only by a written addendum issued by the procurement officer. The invitation for bids may require the acknowledgment of the receipt of all amendments issued. Any amendment issued shall be in the form of an addendum pursuant to section 3-122-27. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302, SLH 1997, Act 352, §1)

§3-122-22 Multi-step sealed bidding. (a)

Multi-step sealed bidding is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtaining the benefits of the competitive sealed proposals procedure through the

solicitation of unpriced technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

(b) Multi-step sealed bidding is a two-phase process consisting of:

- (1) A technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the State based on criteria set forth in the first phase of the invitation for bids; and
- (2) A second phase in which those bidders whose unpriced technical offers are determined to be acceptable based on criteria set forth in the first phase have their priced bids considered and award of a contract is made to the lowest responsive, responsible bidder.

(c) The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable
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to permit an award based on price and it is desirable:

- (1) To invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirement;
- (2) To conduct discussions for the purposes of facilitating understanding of the unpriced technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
- (3) To accomplish subparagraphs (1) and (2) prior to soliciting priced bids; and
- (4) To award the contract to the lowest responsive, responsible bidder in accordance with the competitive sealed bidding procedures.

(d) A pre-bid conference as contemplated by section 3-122-26 may be conducted by the procurement officer.

(e) Prior to the preparation of phase one a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the phase one proposals. A copy of the document identifying any committee members and any

subsequent changes thereto shall be placed in the contract file.

(f) Phase one of multi-step sealed bidding shall be initiated by the issuance of an invitation for bids in the form required by section 3-122-21, except as hereinafter provided, and in addition shall state:

- (1) That unpriced technical offers are requested;
- (2) Whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, the priced bids shall be submitted in a separately sealed envelope;
- (3) That it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
- (4) That the State, to the extent the procurement officer finds necessary, may conduct confidential oral or written discussions of the unpriced technical offers the contents of which shall not be publicly disclosed until

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- (5) the contract is signed by all parties; and That the item being procured shall be furnished generally in accordance with the bidder's unpriced technical offer as found to be finally acceptable and shall meet the requirements of the invitation for bids.

(g) Addenda to the invitation for bids may, after receipt of unpriced technical offers, be issued and distributed only to bidders who submitted unpriced technical offers.

- (1) Those bidders may respond to the amendments in the form of new unpriced technical offers or amendments to the offers submitted.
- (2) If, in the opinion of the procurement officer, a contemplated addendum will significantly change the nature of the procurement, the invitation for bids shall be cancelled in accordance with subchapter 11, and a new invitation for bids issued.
- (h) The unpriced technical offers shall:
 - (1) Not be opened publicly but shall be opened in front of two or more procurement officials;

- (2) Be subject to nondisclosure of trade secrets and other proprietary data to unauthorized persons, as requested by bidders, in writing.
 - (i) The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the invitation for bids. The unpriced technical offers shall be categorized as:
 - (1) Acceptable;
 - (2) Potentially acceptable, that is, reasonably susceptible of being made acceptable; or
 - (3) Unacceptable. The procurement officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.
 - (j) The procurement officer may initiate phase two of the procedure if, in the procurement officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the procurement officer finds that this is not the case, the procurement officer shall issue an amendment to the invitation for bids or engage in technical discussions set forth in subsection (k).
 - (k) The procurement officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable unpriced technical offer,
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subject to the following rules:

- (1) During the course of the discussions the procurement officer shall not disclose any information derived from one unpriced technical offer to any other bidder.
- (2) Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the procurement officer. The submission may be made:
 - (A) At the request of the procurement officer, or
 - (B) Upon the bidder's own initiative.
- (1) Upon completion of phase one, the procurement officer shall:
 - (1) If priced bids were required to be submitted in phase one, open the priced bids from

- bidders whose unpriced technical offers were found to be acceptable; or
- (2) If technical discussions have been held, or if material modifications to the procurement item, project or procedure have been made after the original submission of priced bids, return the sealed priced bids to bidders and provide them reasonable opportunity to submit a modified priced bid; or
 - (3) If priced bids have not been submitted, invite each acceptable bidder to submit a priced bid.
- (m) Phase two shall be conducted as any other competitive sealed bid procurement except as specifically set forth in this subsection:
- (1) No public notice need be given to phase two, submission of priced bids, because the notice was previously given;
 - (2) After the contract is signed by all parties, the unpriced technical offers of all bidders shall be open for public inspection and disclosed as follows:
 - (A) The procurement officer shall examine written request of confidentiality for trade secrets and proprietary data in the technical offer of the bidder to determine the validity of the requests.
 - (B) If the parties do not agree as to the disclosure of data, the procurement

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officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that, unless the bidder protests under chapter 3-126, the offer will be so disclosed.

- (C) If the parties agree to the disclosure, the unpriced technical offers shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data; and
- (n) Mistakes may be corrected or bids may be withdrawn at any time during phase one, provided, during phase two, mistakes may be corrected or withdrawal permitted only in accordance with sections 3-122-28, 3-122-29, and 3-122-31. [Eff 12/15/95; am

and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-23 Bidding time. (a) A minimum of ten calendar days shall be provided between date of the last legal advertisement of the solicitation and the time and date set for receipt of bids.

(b) Bidders shall have a reasonable time to prepare their bids. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-24 Public notice. (a) Public notice of the solicitation shall be made for the purpose of securing competition.

(b) The public notice of the solicitation shall include the following information:

- (1) A brief description of the good, service, or construction desired;
- (2) Where and when the solicitation will be available;
- (3) How long the solicitation will be available, i.e., the deadline for the responses to the solicitation;
- (4) Other appropriate information, e.g., a notice of intention to offer pursuant to section 3-122-108; and
- (5) For a multi-step sealed bid, a general description of the steps to be used in soliciting, evaluating, and selecting

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unpriced bids.

(c) The public notice of availability of the solicitation shall be publicized as follows:

- (1) At a minimum, a one-time legal advertisement published either in a newspaper of general circulation within the State or in a newspaper of local circulation in a county of the State, if available, pertinent to the procurement;
- (2) Optionally, and in addition to (1) above, the following may be utilized:

(A) Notice by mail or facsimile transmission to persons on any applicable bidders mailing list, if any;

(B) Publication by any public or private telecommunication information network; or

(C) Any other method of publication the procurement officer deems effective.

(d) A copy of the solicitation shall be made available for public inspection at the office of the procurement officer issuing the solicitation. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-25 Bidders lists. (a) Bidders lists may be compiled to provide the procurement officer with the names of businesses that may be interested in competing for various types of contracts.

(b) Unless otherwise provided, inclusion of the name of a business is discretionary and does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a contract; nor does it guarantee notification of each solicitation.

(c) Businesses that fail to respond to invitations for bids or notices of availability may be removed from the applicable bidders list.

(d) Names and addresses on bidders lists shall be available for public inspection. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-26 Pre-bid conferences. Pre-bid conferences may be conducted to explain the procurement requirements. The purchasing agency may, for offers

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that have special or unusual requirements, e.g., requiring physical inspection, make attendance at a pre-bid conference a condition for submitting a bid. The condition must be stated prominently in the bid solicitation or in the written notice of a pre-bid meeting.

(1) Pre-bid conferences shall be announced to all prospective bidders in the solicitation or if

- decision to hold a pre-bid conference is made after the issuance of the solicitation, the conference shall be announced in an addendum.
- (2) The conference should be held long enough after the solicitation has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids.
 - (3) Nothing stated at the pre-bid conference shall change the solicitation unless a change is made by written addendum as provided in section 3-122-27.
 - (4) A summary of the conference shall be supplied to all those prospective bidders known to have received a solicitation, in addition to any addendum issued as a result of the conference. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-27 Amendments and clarifications to invitations for bids. (a) Amendments to invitations for bids shall be identified as addenda and shall reference the portions of the invitation for bids it amends and detail the amendments. Other pre-bid communications shall be identified as bid clarification notices.

(b) Addenda shall be used to make any material changes in the invitation for bids as in quantity, purchase descriptions, delivery schedules, and opening dates.

(c) Either addenda or written bid clarification notices shall be used to:

- (1) Correct minor defects or ambiguities;
- (2) Furnish to other bidders information given to one bidder if the information will assist the other bidders in submitting bids or if the lack of the information would prejudice the

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other bidders; and

- (3) Provide any other information or clarification to the invitation for bids that will result in fair competition.

(d) Addenda may require that bidder acknowledge receipt of the addendum issued.

(e) Addenda and bid clarification notices shall be issued to all prospective bidders known to have received an invitation for bids, or if issued after the deadline for submission of notice of intention to bid, to those persons who have submitted such notice.

(f) Addenda shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids; however, if the time and date set for receipt of bids will not permit adequate time for preparation, the time shall be increased to the extent possible in the addendum or, if necessary, by facsimile or telephone and confirmed in the addendum.

(g) Bid clarification notices may be issued anytime up to the scheduled opening of the bids. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-28 Pre-opening modification or withdrawal of bids. Bids may be modified or withdrawn prior to the deadline for submittal of bids by the following documents:

(1) Modification of bids:

- (A) A written notice accompanying the actual modification received in the office designated in the solicitation, stating that a modification to the bid is submitted; or
- (B) A written notice accompanying the actual modification by facsimile machine pursuant to section 3-122-9 to the office designated in the solicitation; provided bidder submits the actual written notice and modification within two working days of receipt of the facsimile.

(2) Withdrawal of bids:

- (A) A written notice received in the office designated in the solicitation; or
- (B) A notice by facsimile machine pursuant to section 3-122-9, to the office

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designated in the solicitation.

- (3) The documents shall be made a part of the appropriate procurement file. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-29 Late bids, late withdrawals, and late modifications. Any notice of withdrawal, notice of modification of a bid with the actual modification, or any bid received at the place designated for receipt and opening of a bid after the time and date set for receipt and opening is late.

- (1) A late bid, late modification, or late withdrawal shall not be considered late if received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity.
- (2) A late bid or late modification will not be considered for award and shall be returned to the bidder unopened as soon as practicable, accompanied by a letter from the procurement activity stating the reason for its return.
- (3) A late withdrawal request except as provided for in section 3-122-31 shall be responded to with a statement of the reason for non-acceptance of the withdrawal.
- (4) Records of each late bid, late modification, or late withdrawal and any related correspondence shall be made a part of the appropriate procurement file. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-30 Receipt, opening, and recording of bids. (a) Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place by the procurement officer until the time and date set for opening. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

(b) Bids and modifications, with the exception of unpriced technical offers submitted in the first phase of multi-step bidding and subject to section 3-122-22(i), shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the invitation for bids.

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- (1) The name of each bidder, the bid price(s), and other information as is deemed appropriate by the procurement officer or his designated representative, shall be read aloud or otherwise made available. If practicable, the information shall also be recorded at the time of opening; that is, the bids shall be tabulated or a bid abstract made.
- (2) The name(s) and address(es) of the required witnesses shall also be recorded at the opening.
- (c) The opened bids, including the priced offers submitted in the second phase of multi-step bidding, shall be available for public inspection at the time of opening except to the extent that the bidder designates trade secrets or other proprietary data to be confidential subject to subsection (d).
- (d) The procurement officer, or his designated representative, shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing.
 - (1) If the parties do not agree as to the disclosure of data, the procurement officer or his designated representative shall inform the bidders present at the opening that the material designated for nondisclosure pursuant to section 3-122-21 shall be subject to written determination by the respective attorney general or corporation counsel for confidentiality in accordance with chapter 92F, HRS.
 - (2) If the attorney general or corporation counsel determines in writing that the material so designated as confidential is subject to disclosure, the bidder submitting the material under review and other bidders who were present at the opening shall be so notified in writing and the material shall be open to public inspection unless the bidder protests under chapter 3-126.
 - (3) The prices, makes and models, or catalogue numbers of items offered, deliveries, and terms of payment shall be publicly available at the time of opening regardless of any designation to the contrary.
- (e) The bids, including unpriced technical offers

submitted in the first phase of multi-step bidding which becomes available for public inspection after the contract is signed by all parties, shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

(f) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-42(12), HRS.

(g) Bids shall be unconditionally accepted without alteration or correction, except as allowed in sections 3-122-29 and 3-122-31. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§92F-42, 103D-202) (Imp: HRS §§92F-42, 103D-302)

§3-122-31 Mistakes in bids. (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

(b) A bidder may remedy a mistake in a bid discovered before the time and date set for opening by withdrawing or correcting the bid as provided in section 3-122-28.

(c) Corrections to bids after opening but prior to award may be made under the following conditions:

- (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. In case of error in extension of bid price, unit price shall govern.
- (2) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made. The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:
 - (A) Typographical errors;
 - (B) Transposition errors;

- (C) Failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating

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the bidder's intent to be bound.

- (3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or for the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

(d) Withdrawal of bids after opening but prior to award may be made if the mistake is attributable to an obvious error which shall affect price, quantity, quality, delivery, or contractual conditions, provided:

- (1) The bidder requests withdrawal by submitting proof of evidentiary value which demonstrates that a mistake was made; and
- (2) The procurement officer prepares a written approval in response to this request.

If the response to the request is a denial, the procurement officer shall notify the bidder in writing.

(e) Correction or withdrawal of bids after award is not permissible except when the chief procurement officer or head of the purchasing agency makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

(f) The determination required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-302, 103D-318)

§3-122-32 Cancellation of solicitations and rejection of bids. Cancellation and rejection of bids shall be pursuant to subchapter 11. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-33 Bid evaluation and award. (a) The award shall be made to the lowest responsive, responsible bidder and shall be based on the criteria set forth in the invitation for bids.

(b) Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the lowest bidder. Examples of

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those criteria include but are not limited to:

- (1) Discounts;
- (2) Transportation costs; and
- (3) Total or life cycle costs.

(c) Evaluation factors need not be precise predictors of actual future costs, but to the extent possible the evaluation factors shall:

- (1) Be reasonable estimates based upon information the government jurisdiction has available concerning future use; and
- (2) Treat all bids equitably.

(d) No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(e) The invitation for bids shall set forth any evaluation criterion to be used in determining product acceptability:

- (1) The solicitation may require the submission of samples, descriptive literature, technical data, or other material to verify product acceptability.
- (2) The solicitation may also provide for accomplishing any of the following prior to award:
 - (A) Inspection or testing of a product for characteristics as quality or workmanship;
 - (B) Examination of elements as appearance, finish, taste, or feel; or
 - (C) Other examinations to determine whether the product conforms with any other purchase description requirements.
- (3) The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offer is acceptable as set forth in the invitation for bids.

(4) Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

(f) Nothing in this section shall permit contract award to a bidder submitting a higher quality item than that designated in the invitation for bids if the bidder is not also the lowest bidder as determined under this section.

(g) The contract shall be awarded with reasonable promptness by written notice to the lowest responsive, responsible bidder whose bid meets the requirements and §3-122-33

criteria set forth in the invitation for bids.

(h) In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope, to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive, responsible bidder, in order to bring the bid within the amount of available funds. If only one responsive bid was received the provisions of subsection 3-122-35(a) shall apply. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-34 Low tie bids. (a) Low tie bids are bids from responsive, responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids.

(b) At the discretion of the procurement officer, award shall be made in any permissible manner that will resolve tie bids, including but not limited to:

- (1) Award the contract to a business providing goods produced or manufactured in this State or to a business that otherwise maintains a place of business in this State; and
- (2) Award the contract to the bidder offering a low tie bid who received the previous award, and continue to award succeeding contracts to the same bidder so long as all low bids are identical.

(c) If no permissible method will be effective in resolving tie bids and a written determination is made so stating, award may be made by drawing lots.

(d) Records shall be made of all invitations for bids on which tie bids are received showing at least the following information and shall be made a part of the procurement file:

- (1) The identification number of the invitation for bids;
- (2) The good, service, or construction item; and
- (3) A listing of all the bidders and the prices submitted. [Eff 12/15/95;
comp NOV 17 1997] (Auth: HRS §103D-202)
(Imp: HRS §103D-302)

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§3-122-35 Waiver to competitive sealed bid process. (a) If for a given invitation for bids, including multi-step bidding, there is only one responsive and responsible offeror:

- (1) An award may be made to the single bidder, provided the procurement officer determines in writing that the price submitted is fair and reasonable, and that either:
 - (A) Other prospective bidders had reasonable opportunity to respond; or
 - (B) There is not adequate time for resolicitation.
- (2) The bid may be rejected pursuant to subchapter 11 and new bids or offers may be solicited if the conditions in paragraph (1) are not met.
- (3) The proposed procurement may be canceled; or
- (4) An alternative procurement method may be conducted to include but not be limited to direct negotiations with the sole bidder first, and then with any contractor or vendor should negotiations with the sole bidder fail, provided the procurement officer determines in writing that the need for the good, service, or construction continues, but that the price of the one bid is not fair and reasonable and either that:
 - (A) There is no time for resolicitation, or
 - (B) Resolicitation would likely be futile.

(b) If for a given invitation for bids, including multi-step bidding, there are no bids received or there are no responsive and responsible offerors, the procurement officer may determine that it is neither practicable, nor advantageous to the State to issue a new solicitation.

- (1) When making this determination, consideration shall be given to:
 - (A) Time constraints;
 - (B) Competition in the marketplace; and
 - (C) Whether the additional potential cost of preparing, soliciting, and evaluating competitive sealed bids is expected to exceed the benefits normally associated with the solicitations.
- (2) In the event of this determination, an alternative procurement method may be selected to include, but not be limited to, direct negotiations.

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(c) Documentation of the alternative procurement method selected shall:

- (1) State the reasons for selection and length of contract period;
- (2) Receive prior approval of the chief procurement officer or a designee; and
- (3) Be made a part of the contract file upon award by the procurement officer. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§§3-122-36 to 3-122-40 (Reserved).

SUBCHAPTER 6

COMPETITIVE SEALED PROPOSALS

§3-122-41 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed proposal method of source selection when it is determined that competitive sealed bidding is neither practicable nor advantageous to the State.

§3-122-42 Dollar thresholds for competitive sealed proposals. Expenditures \$25,000 or more for goods, services, or construction shall be made pursuant to this subchapter except as provided in subchapters 5, 7, 8, 9, and 10. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-43 When competitive sealed bidding is not practicable or advantageous. (a) Unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the invitation for bids, competitive sealed bidding is not practicable or advantageous.

(b) A determination may be made to use

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competitive sealed proposals if it is determined that competitive sealed bidding is not practicable, even though advantageous. Factors to be considered in determining whether competitive sealed bidding is not practicable include:

- (1) Whether the primary consideration in determining award may not be price;
- (2) Whether the contract needs to be other than a fixed-price type;
- (3) Whether the conditions of the goods, services or delivery conditions are unable to be sufficiently described in the invitation for bids;
- (4) Whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;
- (5) Whether offerors may need to be afforded the opportunity to revise their proposals, including price; and
- (6) Whether award may need to be based upon a comparative evaluation as stated in the

request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal.

(c) A determination may be made to use competitive sealed proposals if it is determined that competitive sealed bidding is not advantageous, even though practicable. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

- (1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and
- (2) Whether the factors listed in subsections 3-122-43(4) through 3-122-43(6) are desirable in conducting a procurement rather than necessary; if they are, then the factors may be used to support a determination that competitive sealed bidding is not advantageous.

(d) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §3-122-43

§§103D-202, 103D-318) (Imp: HRS §§103D-303, 103D-318)

§3-122-44 REPEALED. [R NOV 17 1997]

§3-122-45 Determinations. (a) Pursuant to subsection 103D-303(a), HRS, the procurement policy board may approve a list of specified types of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency. This list, as provided in Exhibit A, entitled "Procurements Approved for Competitive Sealed Proposals", dated 06/21/99, attached at the end of this chapter shall be reviewed biennially.

Although the good, service, or construction is listed, purchasing agencies may use the competitive sealed bidding process under section 103D-302, HRS.

(b) If the procurement is not listed pursuant to subsection (a), the head of a purchasing agency shall then determine in writing that competitive sealed proposals is a more appropriate method of contracting in that competitive sealed bidding is neither practicable nor advantageous. The determinations may be made for specified types of goods, services, or construction rather than by individual procurement. Procurement of the types of goods, services, or construction so designated may then be made by competitive sealed proposals without making the determination that competitive sealed proposals is a more appropriate method of contracting.

(c) When it is determined that it is more practicable or advantageous to the State to procure construction by competitive sealed proposals:

- (1) A procurement officer may issue a request for proposals requesting the submission of proposals to provide construction in accordance with a design provided by the offeror; and
- (2) The request for proposals shall require that each proposal submitted contain a single price that includes both design and build.

(d) The head of the purchasing agency who made the determination pursuant to subsection (b) or (c) may modify or revoke it at any time and the determination shall be reviewed for current applicability biennially or on the next procurement for

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these types of goods, services, or construction, whichever occurs later. The head of the purchasing agency may also request that the procurement of the specified types of goods, services, or construction by competitive sealed proposal be added to or deleted from the list in subsection (a).

(e) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp 11/1797] [am JUL 6 1999] (Auth: HRS §§103D-202, 103D-303, 103D-318) (Imp: HRS §§103D-303, 103D-318)

§3-122-46 Preparing a request for proposals. (a)
The request for proposals is used to initiate a

competitive sealed proposal procurement and shall include:

- (1) The specifications for the goods, services, or construction items to be procured, including a description of the performance or benefit required;
- (2) All contractual terms and conditions applicable to the procurement to include tax clearance requirements pursuant to chapter 103D, HRS;
- (3) A statement as to when and in what manner prices are to be submitted;
- (4) A statement concerning whether the proposal shall be accompanied by a proposal security pursuant to subchapter 24 or other evidence of financial responsibility;
- (5) The term of the contract and conditions of renewal or extension, if any;
- (6) Instructions and information to offerors, including pre-proposal conferences, the location where proposals are to be received, and the date, time and place where proposals are to be received and reviewed;
- (7) Proposal preparation time set to provide offerors a reasonable time to prepare their proposals. A minimum of thirty calendar days between the date of last legal advertisement of the solicitation and the time and date set for receipt of proposals, unless a shorter time is deemed appropriate for a particular procurement that will allow for adequate competition as determined in writing by the

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procurement officer;

- (8) The relative importance of price and other evaluation factors; and specific evaluation criteria to be used in evaluation of proposals which may include but is not limited to:
 - (A) Technical capability and approach for meeting performance requirements;
 - (B) Competitiveness and reasonableness of price; and
 - (C) Managerial capabilities.
- (9) A statement that discussions may be conducted with offerors who submit proposals determined

to be reasonably susceptible of being selected for award, but that proposals may be accepted without discussions; and

- (10) A statement that offerors shall designate in writing those portions of the unpriced proposal that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-58; that the material designated as confidential shall be readily separable from the proposal in order to facilitate inspection of the nonconfidential portion of the proposal.

(b) Public notice for goods, non-professional services, and construction shall be given by a purchasing agency with delegated procurement authority by distributing the request for proposals in the same manner provided for distributing an invitation for bids under section 3-122-24. Public notices for professional services shall be in accordance with section 3-122-64.

(c) Pre-proposal conferences may be conducted in accordance with section 3-122-26.

(d) Prior to the preparation of a request for proposal, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals pursuant to section 3-122-52. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303, SLH 1997, Act 352, §1)

§3-122-47 REPEALED. [R NOV 17 1997])

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§3-122-48 Amendments to request for proposals. Amendments to requests for proposals may be made by addenda in accordance with section 3-122-27 prior to submission of proposals. After submission of proposals, amendments may be made by addenda in accordance with subsection 3-122-22(f). [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-49 Modification or withdrawal of proposals. Proposals may be modified or withdrawn prior to the established due date in accordance with section 3-122-28. For the purposes of this section and section 3-122-50, the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only priority listed offerors may submit best and final offers. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-50 Late proposals, late withdrawals, and late modifications. (a) Any proposal, withdrawal request, or modification received after the established due date as defined in section 3-122-49 at the place designated for receipt of proposals is late. They may only be considered in accordance with section 3-122-29(1).

(b) A late bid or late modification shall be disposed of in accordance with paragraph 3-122-29(2). [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-51 Receipt and registration of proposals.

(a) Proposals and modifications shall be time-stamped upon receipt and held in a secure place by the procurement officer until the established due date. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

(1) Proposals and modifications shall not be opened publicly, but shall be opened in the presence of two or more procurement officials.

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(2) Proposals and modifications shall be shown only to State personnel having legitimate interest in them.

(b) After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals:

(1) The name of each offeror;

- (2) The number of modifications received, if any;
and
- (3) A description sufficient to identify the
good, service, or construction item offered.
- (c) The register of proposal shall be open to
public inspection as provided in section 3-122-58.
- (d) Proposals shall be open to public inspection
as provided in section 3-122-58. [Eff 12/15/95; am and
comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-303)
(Imp: HRS §103D-303)

§3-122-52 Evaluation of proposals. (a) The
procurement officer, or an evaluation committee
selected in writing by the procurement officer shall
evaluate proposals. A copy of the document identifying
any committee members and any subsequent changes
thereto shall be placed in the contract file.

(b) Numerical rating systems may be used, but are
not required. When used, the evaluation shall be based
only on the evaluation factors set out in the request
for proposals. The relative priority to be applied to
each evaluation factor shall also be set out in the
request for proposals. If numerical rating systems are
not used, the procurement officer, or each member of
the evaluation committee, as applicable, shall explain
his or her ranking determination in writing which shall
be placed in the procurement file. Evaluation factors
not specified in the request for proposals may not be
considered. The written ranking evaluations or
explanations shall be available for public inspection
after the contract is signed by all parties.

(c) When applicable, cost shall be an evaluation
factor.

(d) The proposal with the lowest cost factor must
receive the highest available rating allocated to cost.
Each proposal that has a higher cost factor than the
lowest must have a lower rating for cost. If a
numerical rating system is used to evaluate the cost
factor, the points allocated to higher-priced proposals
must be equal to the lowest proposal price multiplied

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by the maximum points available for price, divided by
the higher proposal price.

(e) An evaluation factor must be included which
takes into consideration whether an offeror qualifies

for any procurement preferences pursuant to chapter 3-124.

(f) A proposal from a debarred or suspended offeror shall be rejected.

(g) Evaluation meetings may be held by an evaluation committee to discuss the request for proposals, the evaluation process, the weighing of evaluation factors, and proposals received, before evaluation.

(h) Evaluations may not be based on discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation of the offeror. [Eff 12/15/95; am and comp NOV 17 1997]
(Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-53 Discussions with offerors. (a) Before conducting discussions, a "priority list" shall be generated by the procurement officer or evaluation committee.

- (1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable.
- (2) All responsive, responsible offerors who submit acceptable or potentially acceptable proposals are eligible for the priority list.
- (3) If numerous acceptable and potentially acceptable proposals have been submitted, the procurement officer or the evaluation committee may rank the proposals and limit the priority list to at least three responsive, responsible offerors who submitted the highest-ranked proposals.
- (4) Those responsive, responsible offerors who are selected for the priority list are referred to as the "priority-listed offerors."

(b) Discussions will be limited to only "priority-listed offerors" and are held to:

- (1) Promote understanding of a state agency's requirements and priority-listed offerors' proposals; and

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- (2) Facilitate arriving at a contract that will be most advantageous to the State, taking into consideration the evaluation factors set forth in the request for proposals.

The procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the date, place, purpose of meetings and those attending.

(c) Proposals may be accepted on evaluation without discussion.

(d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.

- (1) Any substantial oral clarification of a proposal shall be reduced to writing by the priority-listed offeror.
- (2) If during discussions there is a need for any substantial clarification or change in the request for proposal, the request for proposal shall be amended by an addendum to incorporate the clarification or change.

(e) Addenda to the request for proposals shall be distributed only to priority-listed offerors.

- (1) The priority-listed offerors shall be permitted to submit new proposals or to amend those submitted.
- (2) If in the opinion of the procurement officer or the evaluation committee, a contemplated amendment will significantly change the nature of the procurement, the request for proposals shall be canceled and a new request for proposals issued.

(f) The contents of any proposal shall not be disclosed so as to be available to competing offerors during the discussion and negotiation process. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-54 Best and final offers. (a) The procurement officer shall establish a date and time for the priority-listed offerors to submit their best and final offers.

(b) Best and final offers shall be submitted only once; unless, the chief procurement officer or the head of a purchasing agency or a designee of either officer above the level of procurement officer determines in writing that it is in the State's best interest to

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conduct additional discussions or change the State's requirements and require another submission of best and final offers; otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award.

(c) Priority-listed offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(d) After best and final offers are received, final evaluations will be conducted for an award pursuant to section 3-122-57. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-55 Mistakes in proposals. (a) Proposals may be modified or withdrawn as provided in section 3-122-49.

(b) Mistakes shall not be corrected after award of contract.

(c) Mistakes discovered before award of the contract:

- (1) When the procurement officer knows or has reason to conclude before award that a mistake has been made, the procurement officer shall request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn pursuant to this section.
- (2) Once discussions are commenced or after best and final offers are requested, any priority-listed offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.
- (3) If discussions are not held, or if the best and final offers have been received by the date and time due, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.

(4) If discussions are not held, or if the best and final offers have been received by the date and time due, an offeror alleging a
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material mistake of fact which makes a proposal nonresponsive may be permitted to withdraw the proposal if the procurement officer or the evaluation committee determines that:

- (A) The mistake is clearly evident on the face of the proposal but the intended correct offer is not; or
- (B) The offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.

(d) Technical irregularities that are matters of form rather than substance evident from the proposal document, and insignificant mistakes that have no effect on price, quality or quantity, may be waived or corrected by the procurement officer or the evaluating committee. If discussions are not held or if best and final offers have been received by the date and time due, the procurement officer may waive technical irregularities or allow an offeror to correct them if either is in the best interest of the State. Examples include the failure of an offeror to:

- (1) Return the number of signed proposals required by the request for proposal;
- (2) Sign the proposal or provide an original signature, but only if the unsigned or photocopied proposal signature is accompanied by other material indicating the offeror's intent to be bound; or
- (3) Acknowledge receipt of an amendment to the request for proposal, but only if it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms; or the amendment involved had no effect on price, quality or quantity.

(e) The procurement officer shall prepare a written decision showing that relief was granted or denied whenever a request for correction or withdrawal of a proposal is made in accordance with this section.
[Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-56 Cancellation of solicitations and rejection of proposals. Cancellation and rejection of proposals shall be pursuant to subchapter 11. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

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§3-122-57 Award of contract. (a) The procurement officer shall award a contract under competitive sealed proposals to the responsive, responsible offeror whose proposal is determined in writing to be the most advantageous to the State taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

(b) Pursuant to subchapter 15, cost or pricing data shall be submitted to the procurement officer by the vendor for any contract expected to exceed \$100,000. This requirement may be waived only under the provisions of section 3-122-124.

(c) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-302, 103D-318)

§3-122-58 Public inspection. (a) The existing contract file, except those portions the offeror designates in writing as trade secrets or other proprietary data to be confidential subject to subsection (b), may be available for public inspection upon notice of award and shall be available for public inspection after the contract is signed by all parties.

The contract file shall include but not be limited to the following:

- (1) The register of proposals prepared pursuant to section 3-122-51;
- (2) A listing of all vendors to whom copies of the request for proposals were distributed;
- (3) Name of successful offeror and dollar amount of offer;
- (4) The basis on which the award was made;
- (5) A copy of the request for proposals;
- (6) A copy of the successful offeror's proposal;

- (7) A copy of all unsuccessful offeror's proposals; and
- (8) A copy of the executed contract resulting from the request for proposals.
- (b) If a person requests to inspect the portions of an offeror's proposal designated as confidential pursuant to section 3-122-46, the inspection shall be subject to written determination by the respective attorney general or corporation counsel for §3-122-58

confidentiality in accordance with chapter 92F, HRS.

(c) If the attorney general or corporation counsel determines in writing that the material designated as confidential is subject to disclosure, the material shall be open to public inspection unless the offeror protests under chapter 3-126.

(d) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-15.5, HRS. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §§92F-42, 103D-303)

§3-122-59 Waiver to competitive sealed proposal process. (a) If for a given request for proposals, there is only one responsive and responsible offeror submitting an acceptable proposal:

- (1) An award may be made to the single offerer, provided the procurement officer determines in writing that the price submitted is fair and reasonable and that either:
 - (A) Other prospective offerors had reasonable opportunity to respond; or
 - (B) There is not adequate time for resolicitation.
- (2) The offer may be rejected pursuant to subchapter 11 and new requests for proposals may be solicited if the conditions in paragraph (1) are not met.
- (3) The proposed procurement may be cancelled.
- (4) An alternative procurement method may be conducted to include, but not be limited to, direct negotiations with the sole offeror first, and then with any contractor or vendor should negotiations with the sole offeror

fail, provided the procurement officer determines in writing that the need for the good, service, or construction continues, but that the price of the one offer is not fair and reasonable and that either:

- (A) There is no time for resolicitation, or
- (B) Resolicitation would likely be futile.

(b) If for a given request for proposals, there are no proposals received or there are no responsive and responsible offerors submitting acceptable proposals, the procurement officer may determine that it is neither practical, nor advantageous to issue a

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new solicitation.

- (1) When making this determination, consideration shall be given to:

- (A) Time constraints;
- (B) Competition in the marketplace; and
- (C) Whether the additional potential cost of preparing, soliciting, and evaluating competitive sealed proposals is expected to exceed the benefits normally associated with the solicitations.

- (2) In the event of this determination, an alternative procurement method may be selected, to include but not be limited to, direct negotiations.

(c) Documentation of the alternative procurement method selected shall:

- (1) State the reasons for selection and length of contract period;
- (2) Receive prior approval of the chief procurement officer or a designee; and
- (3) Be made a part of the contract file upon award by the procurement officer. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§§3-122-60 to 3-122-61 (Reserved).

SUBCHAPTER 7

PROCUREMENT OF PROFESSIONAL SERVICES

§3-122-63 Procurement of professional services.

(a) This subchapter provides rules for procuring professional services pursuant to section 103D-304, HRS.

(b) Notwithstanding any provision of chapter 103D, HRS, or any rule under this subtitle, no contract for professional services shall be awarded unless:

- (1) The professional services to be procured shall be in accordance with sections 103D-302, 103D-303, 103D-304, 103D-305, 103D-306, or 103D-307, HRS; and

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- (2) The contract shall be awarded on the basis of demonstrated competence and qualification for the type of services required at fair and reasonable prices.

(c) Contract change orders or modifications for professional services awarded pursuant to 103D-303 or 103D-304, HRS, shall require prior approval of the head of the purchasing agency when the increase is at least \$25,000 and ten per cent of the initial contract price. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-64 Annual public notice for professional services. (a) At least annually, before the beginning of the fiscal year and more often as may be necessary, the head of the purchasing agency shall, pursuant to section 3-122-24(c), invite persons engaged in performing professional services to submit current statements of qualifications and expressions of interest to purchasing agencies requiring the services which the agency anticipates needing in the next fiscal year. The statements shall include:

- (1) The name of the firm or person, the principal place of business, and location of all of its offices;
- (2) The age of the firm and its average number of employees over the past years;
- (3) The education, training, and qualifications of key members of the firm;

- (4) The names and phone numbers of up to five clients who may be contacted, including at least two for whom services were rendered during the preceding year; and
- (5) Any promotional or descriptive literature which the firm desires to submit.

Firms or persons may amend statements of qualifications at any time by filing a new statement and shall immediately inform the head of the purchasing agency of any change in their submission that would disqualify the firm or person from being considered for a contract award.

(b) Additional public notices inviting persons engaged in providing professional services may be made if the response to the initial notice is not adequate, the response to the initial notice does not result in an adequate representation of available sources, or previously unanticipated needs for professional

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services arise. [Eff 12/15/95; am and
comp NOV 17 1997] (Auth: HRS §103D-202) (Imp:
HRS §103D-304)

§3-122-65 Procedures for procurement of professional services. (a) The head of the purchasing agency shall designate a review committee to evaluate statements of qualifications and related information submitted to that purchasing agency for the purpose of compiling a list of qualified persons to provide particular types of professional services. The review committee shall consist of at least three employees from the agency or from another governmental body with sufficient education, training, and licenses or credentials for each type of professional service which may be required.

(b) If a purchasing agency identifies a need to procure professional services pursuant to section 103D-304(d), HRS, it shall proceed as follows:

- (1) Establish a screening committee of at least three employees of the purchasing agency with sufficient education, training, and licenses or credentials in the area of the services required. If the purchasing agency and the using agency are different, at least one qualified employee appointed by the head of

the using agency shall be from the using agency, making the total of the screening committee at least four. Employees of other agencies may be designated to serve on the committee only if qualified employees from the purchasing and using agencies are not available.

- (2) The screening committee shall establish criteria for the selection of the names of a minimum of three persons from the subsection (a) list of qualified persons.
- (3) The screening committee shall evaluate the submissions of subsection (a) list of qualified persons against the criteria established for selection. The committee may conduct confidential discussions with any person on the subsection (a) list of qualified persons regarding the services which are required and the services they are able to provide. In conducting discussions, there shall be no disclosure of any

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information derived from proposals submitted by competing offerors;

- (4) The screening committee shall provide the head of the purchasing agency with the names of a minimum of three persons that have been determined to be the most qualified, together with a summary of their qualifications;
- (5) The head of the purchasing agency shall evaluate the summary of qualifications of the persons provided by the screening committee and may conduct discussions with any of the persons. The head of the purchasing agency shall rank each person in order of preference;
- (6) The head of the purchasing agency shall negotiate a contract that is established in writing and based upon the estimated value, scope, complexity, and nature of the services to be rendered, including the rate of compensation which is fair and reasonable, as follows:
 - (A) Negotiation shall be conducted with the first person;

- (B) If a satisfactory contract cannot be negotiated with the first person, negotiations with that person shall be formally terminated and negotiations with the second person shall commence;
- (C) If negotiations fail with the second person, negotiations with the next person shall commence; and
- (D) If a contract at a fair and reasonable price cannot be negotiated, the screening committee may be asked to submit a minimum of three additional persons for the head of the purchasing agency to rank, and resume negotiations in the same manner provided in this subsection.

(7) Negotiations shall be conducted confidentially.

(c) Pursuant to subchapter 15, cost or pricing data shall be submitted to the head of the purchasing agency for any contract expected to exceed \$100,000. This requirement may be waived only under the provisions of section 3-122-124.

(d) After the contract is signed by all parties, the following information shall be open to public

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inspection, including but not limited to the contract, the list of qualified persons, the screening committee's criteria for selection established under section 3-122-65(b)(2), and the statements of qualifications and related information submitted by the qualified persons, except those portions for which a written request for confidentiality has been made subject to section 3-122-58. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-66 Waiver to requirement for procurement of professional services. (a) If less than three persons are qualified pursuant to section 3-122-65, the head of the purchasing agency may determine that for a given request:

- (1) Negotiations may be conducted provided that:
 - (A) The prices submitted are fair and reasonable; and

- (B) Other prospective offerors had reasonable opportunity to respond; or there is not adequate time to resolicit through public notice statements of qualifications and expressions of interest; or
 - (2) The offers may be rejected pursuant to subchapter 11 and new expressions of interest may be solicited if the conditions in subparagraphs (A) and (B) are not met;
 - (3) The proposed procurement may be cancelled; or
 - (4) An alternative procurement method may be conducted to include but not be limited to direct negotiations with other potential offerors if the head of the purchasing agency determines in writing that the need for the service continues, but that either the price of the offers received are not fair and reasonable or that the qualifications of the offerors are not adequate to meet the procurement needs, and there is no time for resolicitation, or resolicitation would likely be futile.
- (b) If no responses are qualified pursuant to section 3-122-65, the head of the purchasing agency may determine that for a given request it is neither practicable nor advantageous for the State to procure a service by again soliciting expressions of interest.
- §3-122-66

- (1) When making this determination, consideration shall be given to the competition in the marketplace and whether the additional potential cost of preparing, soliciting and evaluating responses is expected to exceed the benefits normally associated with the solicitations; and
 - (2) In the event of this determination, a more cost effective procurement method may be selected, to include but not be limited to direct negotiations.
- (c) Documentation of the alternative procurement method selected shall:
- (1) State the reasons for selection and length of contract period;
 - (2) State why the provisions of subchapters 8, 9, and 10 do not apply;

- (3) Receive written approval of the chief procurement officer or a designee; and
- (4) Be made a part of the contract file upon award by the procurement officer. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-67 Small purchases of professional services. (a) Contracts for professional services of less than \$25,000 may be negotiated by the head of a purchasing agency with any two persons who appear on the list of qualified persons established pursuant to section 3-122-65(a).

(b) Negotiations shall be conducted in the manner set forth in section 3-122-65(b)(5) and (6) but without establishing any order of preference. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-304, 103D-305)

§3-122-68 Record of procurement actions. (a) Pursuant to section 103D-321, HRS, the chief procurement officer shall maintain a record by fiscal year of all procurements \$25,000 or more made under section 103D-304, HRS, for a minimum of five years. The record shall be available for public inspection.

(b) By August 15 of each year, the chief procurement officer shall forward a copy of the record to the administrator. The record shall reflect procurement actions for the prior fiscal year and shall

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contain at a minimum:

- (1) Each contractor's name;
 - (2) The amount and type of each contract; and
 - (3) A listing of the goods, services, or construction procured under each contract.
- (c) The administrator shall forward a consolidated report to the legislature by October 1. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-321)

§§3-122-69 to 3-122-72 (Reserved).

SUBCHAPTER 8

SMALL PURCHASES

§3-122-73 Definitions. As used in this subchapter:

"Adequate and reasonable competition" means the amount of vendors solicited based upon the number of vendors available and the value or price of the goods, service, or construction. Because of variations in circumstances, it is not possible to define what is adequate and reasonable competition for every small procurement. However, in general, the more vendors there are that can meet the needs of the agency, or the higher the price of the goods, services, or construction, then a greater number of vendors should be solicited. [Eff 12/15/95; comp]
(Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-104, 103D-305)

§3-122-74 Conditions for use. (a) Expenditures less than \$25,000 for goods , services, or construction, shall be made in accordance with the following procedures. Expenditures made pursuant to these procedures do not require public notice or public bid openings.

(b) Contracts for professional services of less than \$25,000 may be procured pursuant to this subchapter or subchapter 7.

(c) Unless otherwise exempt, purchasing agencies delegated small purchase authority shall also comply

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with state procurement office price lists or other chief procurement officer price lists, where applicable.

(d) Small purchases shall not be parceled by dividing the purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, so as to evade the statutory competitive bidding requirements. For additional details, refer to chapter 3-131.

(e) Preferences pursuant to chapter 3-124, shall not apply to small purchases. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-75 Goods and services. (a) Expenditure with an estimated total cost that is at least \$15,000 but less than \$25,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and reasonable competition of no less than three written quotations shall be solicited; and
- (2) Considering all factors, including but not limited to quality, warranty and delivery, award shall be made to the vendor with the most advantageous quotation.

(b) Expenditure with an estimated total cost that is at least \$5,000 but less than \$15,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and reasonable competition of no less than three quotations shall be solicited; and
- (2) Considering all factors, including but not limited to quality, warranty and delivery, award shall be made to the vendor with the most advantageous quotation.

(c) Expenditure with an estimated total cost that is less than \$5,000 shall be by procedures established by each chief procurement officer. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-76 Construction. (a) Expenditure with an estimated total cost that is at least \$15,000 but less than \$25,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and

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reasonable competition of no less than three written quotations shall be solicited; and

- (2) Award shall be made to the vendor submitting the lowest quotation.

(b) Expenditure with an estimated total cost that is at least \$5,000 but less than \$15,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and

reasonable competition of no less than three quotations shall be solicited; and

- (2) Award shall be made to the vendor submitting the lowest quotation.

(c) Expenditure with an estimated total cost that is less than \$5,000 shall be by procedures established by each chief procurement officer. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-77 Procurement file. All quotations received shall be recorded and placed in a procurement file. When three quotations are required but are not obtained, e.g., insufficient sources, sole sources, emergencies, the reason shall be recorded and placed in the procurement file. The file shall also include a written justification when award is made to other than the vendor submitting the lowest quotation. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§§3-122-78 to 3-122-80 (Reserved).

SUBCHAPTER 9

SOLE SOURCE PROCUREMENT

§3-122-81 Conditions for use. (a) A sole source purchase may be made when there is only one source available from which a particular good, service, or construction may be obtained. This rule shall apply to all sole source expenditures for goods, services, and construction that are \$25,000 or more, unless the expenditure is expressly exempt from public bidding by law or rule. For expenditures less than the above bid levels, agencies shall follow the procedures for small

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purchases.

(b) To justify a sole source purchase, an agency must establish that:

- (1) The particular good, service, or construction has a unique feature, characteristic, or capability, e.g.:
 - (A) Proprietary item;
 - (B) Compatibility to existing equipment; or
 - (C) Public utility repair or construction that can only be provided by the utility company;
 - (2) The unique feature, characteristic, or capability is essential in order for the agency to accomplish its work;
 - (3) The particular good, service, or construction having the unique feature, characteristic, or capability is available from only one supplier or source; and
 - (4) There is justification for a multi-term contract pursuant to section 3-122-149, otherwise the contract period shall be for one year.
- (c) When a good or service is necessary in a limited quantity for test or evaluation, the purchase of the item or service may be on a sole source basis with the approval of the chief procurement officer.
- (d) When an item is referred to by an exact brand, but there are other brands that qualify as "equals," the purchase shall be subject to bidding.
- (e) When an item is unique, but is available from more than one supplier, the purchase shall be considered a "restrictive" purchase rather than a sole source purchase and shall be subject to bidding.
- (f) The fact that a person or organization is or has been furnishing services to a purchasing agency does not, by itself, render the person or organization the only source for the type of service required.
- (g) The potential loss of funds at the end of a fiscal year shall not be a basis for sole source exemption.
- (h) The procurement officer should conduct negotiations with the sole source vendor to determine the factors as cost, quality, terms, and delivery.
- (i) Pursuant to subchapter 15, cost or pricing data shall be submitted to the procurement officer by the vendor for any contract expected to exceed \$100,000. This requirement may be waived only under
- §3-122-82

the provisions of section 3-122-124.

(j) If the sole source purchase is approved, the purchasing agency shall, pursuant to section 103D-309, HRS, and subchapter 12, obtain certification that funds are available for the amount of the purchase.

(k) Pursuant to section 103D-306(c), HRS, the procurement policy board shall maintain a list which constitutes sole source procurements that may be procured without obtaining a sole source exemption, pursuant to section 3-122-82. However, the chief procurement officer may request reports from the heads of purchasing agencies on procurements made pursuant to section 103D-306(c), HRS.

The list of sole source procurements shall be reviewed by the board annually for changes and is attached at the end of this chapter as Exhibit B entitled "Procurements Approved for Sole Source", dated 06/21/99. Purchasing agencies shall cite on the purchase order or on the contract the sole source authority as "Approved for Sole Source Procurement pursuant to Section 3-122-81, (cite sole source number from attached list), Hawaii Administrative Rules". [Eff 12/15/95; am and comp 11/17/97] [am JUL 6 1999] (Auth: HRS §§103D-202, 103D-306, 103D-312) (Imp: HRS §§103D-306, 103D-309, 103D-312)

§3-122-82 Requesting sole source approval. (a) Forms required to implement the provisions for sole source approval will be distributed by the chief procurement officer.

(b) To obtain sole source approval from the chief procurement officer, the following procedures shall be followed:

- (1) Complete and submit a "Request For Sole Source" to the chief procurement officer. Heads of purchasing agencies shall certify to the best of their knowledge that the information provided is true and correct;
- (2) If a rush review of a request is needed, complete and submit a separate memorandum explaining and justifying the reason for the rush review; and
- (3) Complete and submit a "Notice of Sole Source" which shall serve as a written determination to issue a sole source contract.

(c) The chief procurement officer and the purchasing agency shall post a copy of the "Notice of §3-122-82

Sole Source" in an area accessible to the public, at least seven days prior to any approval action.

- (1) Any inquires shall be directed to the designated contact person of the purchasing agency.
- (2) Any objections to the request for sole source shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the sole source request on hold, review the objection, and provide a written determination to the person submitting the objection. All documents relating to the objection, including written summary of the disposition of the objection, shall be kept with the sole source file.
- (d) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-306, 103D-318) (Imp: HRS §§103D-306, 103D-318)

§3-122-83 Amendments to sole source contracts.
Amendments to sole source contracts that would change the original scope of the contract, or increase the original contract price by ten per cent or more, may only be made with the approval of the chief procurement officer. The annual renewal of a sole source contract for services should not be submitted as an amendment. To amend a sole source contract, the following procedures shall be followed:

- (1) Complete and submit a "Notice of Amendment to Sole Source Contract" to the chief procurement officer. Heads of purchasing agencies shall certify to the best of their knowledge that the information provided is true and correct;
- (2) Submit copy of the contract or agreement between the agency and the contractor with the "Notice of Amendment to Sole Source Contract";
- (3) The chief procurement officer and the purchasing agency shall post a copy of the "Notice of Amendment to Sole Source Contract" in an area accessible to the public, at least

- seven days prior to any approval action;
- (4) Any inquiries shall be directed to the designated contact person of the purchasing agency; and
- (5) Any objections to the amendments to sole source contracts shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the sole source request on hold, review the objection and provide a written response to the person submitting the objection. All documents relating to the objection, including a written summary of the disposition of the objection, shall be kept with the sole source file. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-306)

§3-122-84 Record of procurement actions. (a) Pursuant to section 103D-321, HRS, the chief procurement officer shall maintain a record by fiscal year of all procurements \$25,000 or more made under section 103D-306, HRS, for a minimum of five years.

(b) By August 15 of each year, the chief procurement officer shall forward a copy of the record to the administrator. The record shall reflect procurement actions for the prior fiscal year and be in the format prescribed by the administrator.

(c) The administrator shall forward a consolidated report to the legislature by October 1 and provide an information copy to the procurement policy board. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-321)

§§3-122-85 to 3-122-87 (Reserved).

SUBCHAPTER 10

EMERGENCY PROCUREMENT

§3-122-88 Application. This subchapter shall apply to all emergency procurement expenditures for goods, services, or construction, \$25,000 or more. For §3-122-88

expenditures less than the dollar levels stated herein, agencies shall follow the procedures for small purchases. Emergency procurement may be utilized only to purchase that which is necessary to cover the emergency, subsequent requirements shall be obtained using normal purchasing procedures. The potential loss of funds at the end of a fiscal year is not considered to be an emergency. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-307)

§3-122-89 Definition. As used in this subchapter:

"Emergency condition" means a situation which creates a threat to public health, welfare, or safety that may arise by reason of major natural disaster, epidemic, riot, fire, or other reasons as may be proclaimed by the head of a purchasing agency. The emergency condition creates an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods, the lack of which would seriously threaten the continued function of government, the preservation or protection of property, or the health or safety of any person. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-307)

§3-122-90 Procedures. (a) Prior to the procurement or if time does not permit, as soon as practicable thereafter, the head of the purchasing agency responsible for the emergency procurement shall prepare a written determination requesting the approval from the chief procurement officer, indicating the following:

- (1) Nature of the emergency;
- (2) Name of contractor;
- (3) Amount of expenditure;
- (4) Listing of the good, service, or construction; and
- (5) Reason for selection of the contractor.

(b) Competition as is practicable shall be obtained to assure that the required good, service, or construction item is procured in time to meet the emergency.

(c) As soon as is practicable, a confirming purchase order must be prepared. Include in detail any

§3-122-95

agreements, including price, made orally with the contractor.

(d) Pursuant to subchapter 15, cost or pricing data shall be submitted to the procurement officer by the vendor for any award expected to exceed \$100,000. However, data for an emergency procurement may be submitted after award. This requirement may be waived only under the provisions of section 3-122-124.

(e) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-307, 103D-318) (Imp: HRS §§103D-307, 103D-318)

§3-122-91 Record of procurement actions. (a) Pursuant to section 103D-321, HRS, the chief procurement officer shall maintain a record by fiscal year of all procurements \$25,000 or more made under section 103D-307, HRS, for a minimum of five years.

(b) By August 15 of each year, the chief procurement officer shall forward a copy of the record to the administrator. The record shall reflect procurement actions for the prior fiscal year and be in the format prescribed by the administrator.

(c) The administrator shall forward a consolidated report to the legislature by October 1 and provide an information copy to the procurement policy board. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-321)

§§3-122-92 to 3-122-94 (Reserved).

SUBCHAPTER 11

CANCELLATION OF SOLICITATIONS AND REJECTION

OF OFFERS

§3-122-95 Cancellation of solicitations and rejection of offers. (a) An invitation for bids, a request for proposals, or any other solicitation may be cancelled, or a bid, proposal, or any other offer may be rejected in whole or in part as may be specified in the solicitation, in accordance with the provisions of §3-122-95

this section.

(b) The reasons for the cancellation or rejection shall:

- (1) Include but not be limited to cogent and compelling reasons why the cancellation of the solicitation or rejection of the offer is in the purchasing agency's best interest; and
- (2) Be made part of the contract file.

(c) Each solicitation issued by the purchasing agency shall state that the solicitation may be cancelled or offers may be rejected in whole or in part when in the best interest of the purchasing agency as provided in this subchapter. [Eff 12/15/95; comp] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§3-122-96 Cancellation of solicitation. (a) A solicitation shall be cancelled for reasons including but not limited to the following:

- (1) Cancellation prior to opening:
 - (A) The agency no longer requires the goods, services, or construction;
 - (B) The agency no longer can reasonably expect to fund the procurement;
 - (C) Proposed amendments to the solicitation would be of a magnitude that a new solicitation is desirable; or
 - (D) A determination by the chief procurement officer that a cancellation of the solicitation is in the public interest.
- (2) Cancellation after opening but prior to award:
 - (A) The goods, services, or construction being procured are no longer required;

- (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
- (C) The solicitation did not provide for consideration of all factors of significance to the agency;
- (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (E) All otherwise acceptable offers received are at clearly unreasonable prices;
- (F) There is reason to believe that the

§3-122-97

offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or

- (G) A determination by the chief procurement officer that a cancellation of the solicitation is in the public interest.

(b) A notice of cancellation shall be sent to all businesses solicited and the notice shall include:

- (1) Identity of the solicitation;
- (2) Brief explanation of the reason(s) for cancellation; and
- (3) Where appropriate, an explanation that an opportunity will be given to compete on any resolicitation or any future procurements of similar goods, services, or construction.

(c) Documentation on the reasons for cancellation shall be made a part of the procurement file and shall be available for public inspection. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§3-122-97 Rejection of bids and proposals. (a) Bids shall be rejected for reasons including but not limited to:

- (1) The bidder that submitted the bid is nonresponsive as determined by subchapter 13;
- (2) The bid is not responsive, that is, it does not conform in all material respects to the

invitation for bids under the provisions of subchapter 13; or

- (3) The good, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the invitation for bids under the provisions of section 3-122-33.

(b) Proposals need not be unconditionally accepted without alteration or correction, unless the solicitation states otherwise, and the agency's stated requirements may be revised or clarified after proposals are submitted.

- (1) This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal.

§3-122-97

- (2) Reasons for rejecting proposals include but are not limited to:

- (A) The offeror that submitted the proposal is nonresponsive as determined under subchapter 13;
- (B) The proposal ultimately, after any opportunity has passed for altering or clarifying the proposal, fails to meet the announced requirements of the agency in some material respect; or
- (C) The proposed price is clearly unreasonable.

(c) Unless allowed by the solicitation, an offer may not limit acceptance to the entire offer:

- (1) If acceptance is so limited, the offers shall be deemed to be nonresponsive.
- (2) If the offer is properly so limited, the purchasing agency shall not reject part of the offer and award on the remainder.

(d) A notice of rejection shall be sent to the individual offeror advising of the reasons therefor.

[Eff 12/15/95; comp] (Auth: HRS
§§103D-202, 103D-308) (Imp: HRS §103D-308)

§3-122-98 Disposition of offers. When offers are rejected, or a solicitation cancelled after offers are received:

- (1) The offers which have been opened shall be retained in the procurement file; and
- (2) The unopened offers shall be returned to the offerors upon request; or otherwise disposed of. [Eff 12/15/95; comp]
(Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§§3-122-99 to 3-122-101 (Reserved).

SUBCHAPTER 12

CONTRACT NOT BINDING UNLESS FUNDS AVAILABLE

§3-122-102 Contract not binding unless funds available. (a) No contract awarded pursuant to the following methods of source selection shall be binding
§3-122-102

or of any force and effect without an endorsement by the respective chief financial officer, as the case may be, that there is an appropriation or balance of an appropriation over and above all outstanding contracts sufficient to cover the amount required by the contract:

- (1) Competitive sealed bidding, pursuant to subchapter 5;
 - (2) Competitive sealed proposals, pursuant to subchapter 6; and
 - (3) Sole source procurement, pursuant to subchapter 9.
- (b) Exceptions to the certification of funds requirement in subsection (a) are as follows:
- (1) If a contract is a multi-term contract pursuant to section 3-122-149, the respective chief financial officer, as the case may be, shall only be required to certify that there is an appropriation or balance of an appropriation over and above all outstanding contracts that is sufficient to cover the amount required to be paid under the contract during the current fiscal year or remaining portion of the current fiscal year of the first term of the multi-term contract.

Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore from sources which are identified in writing;

- (2) If the contract is one under which the total amount to be paid to the contractor cannot be accurately estimated at the time the contract is to be awarded; and
- (3) If there is no direct expenditure of public funds from the State to the contractor.

(c) Notwithstanding the requirement for certification set forth above, certification of a portion of the total funds required for a contract may be permitted when an immediate solicitation will result in significantly more favorable contract terms and conditions to the State than a solicitation made at a later date; provided that certification for partial funding shall be permitted only if the respective chief financial officer, as the case may be, states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues.

§3-122-102

All contracts partially funded shall be enforceable only to the extent to which funds have been certified as available. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §§103D-309, 103D-315)

§3-122-103 Contracts involving federal funds.

(a) Section 3-122-102 shall be applicable to contracts in which state or county funds are supplemented by the federal government and to contracts one hundred per cent federally funded however, this requirement shall be liberally construed so as not to hinder or impede the State in contracting for any project involving financial aid from the federal government.

(b) In addition to the requirements of section 3-122-102, any contract supplemented by federal funds shall contain a statement to the effect that parties to the contract agree that, as to the portion of the obligation under the contract to be payable out of federal funds, the contract shall be construed to be an

agreement to pay the portion to the contractor only out of federal funds to be received from the federal government when the federal funds are so received and shall not be construed as a general agreement to pay the portion at all events out of any funds other than those which are received from the federal government.

(c) In addition to the requirements of section 3-122-102, any contract funded one hundred per cent by federal funds shall contain a statement to the effect that the parties agree that the contract shall be construed as an agreement to pay the contract price only out of federal funds to be received from the federal government when the federal funds are so received. [Eff 12/15/95; am and comp]
(Auth: HRS §103D-202) (Imp: HRS §103D-309)

§3-122-104 REPEALED. [R]

§§3-122-105 to 3-122-107 (Reserved).

SUBCHAPTER 13

RESPONSIBILITY OF BIDDERS AND OFFERORS

§3-122-108

§3-122-108 Qualification of bidders and offerors.

(a) Prospective bidders or offerors shall be capable of performing the work for which offers are being called. Each prospective bidder or offeror shall file a written or facsimile notice of intention to submit an offer pursuant to section 3-122-9, subject to the following:

- (1) The notice of intention to submit an offer shall be received not less than ten days prior to the date designated for opening.
- (2) A notice of intention to submit an offer shall be filed for the construction of any public building or public work when the offer submitted for the project by a contractor is or will be \$25,000 or more.
- (3) A notice of intention to submit an offer need not be filed for the procurement of goods and

services, unless specified in the solicitation.

- (4) The requirement for a notice of intention to submit an offer may be waived if there is only one offeror and the procurement officer concludes that acceptance of the bid will be in the best interest of the public. For this purpose, the procurement officer shall prepare a written determination setting forth the basis for the acceptance.

(b) Upon notification of the bidder's intent to submit an offer, the procurement officer shall determine whether the prospective offeror has the ability to perform the work intended. For this purpose, the procurement officer may require any prospective offeror to submit answers to questions contained in the sample questionnaire provided by the policy board.

- (1) All information contained in answers to the questionnaire shall be and remain confidential. Questionnaires so submitted shall be returned to the bidders after having served their purpose.
- (2) Any government officer or employee who knowingly divulges or permits to be divulged any information to any person not lawfully entitled thereto shall be fined not more than \$250.00. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§3-122-109

§3-122-109 Questionnaire. (a) The questionnaire shall request information for the following categories:

- (1) Financial ability to deliver the goods or perform the work required;
- (2) Material, equipment, facility, and personnel resources and expertise available, or the ability to obtain them, in order to meet contractual requirements;
- (3) References for the determination of a satisfactory record of performance;
- (4) References for the determination of a satisfactory record of integrity;
- (5) Legal qualifications to contract with the State; and

- (6) Additional information necessary for a determination of responsibility. [Eff 12/15/95; comp] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§3-122-110 Determination of nonresponsibility.

(a) The procurement officer shall determine, on the basis of available information, the responsibility or nonresponsibility of a prospective offeror.

(b) If the procurement officer requires additional information, the prospective offeror shall promptly supply the information. Failure to supply the requested information at least forty-eight hours prior to the time advertised for the opening shall be considered unreasonable and may be grounds for a determination of nonresponsibility.

(c) Notwithstanding the provision of paragraph (b), the head of the purchasing agency shall not be precluded from requesting additional information.

(d) Upon determination that a prospective offeror is not fully qualified to perform the work, the head of the purchasing agency or designee shall afford the prospective offeror an opportunity to be heard. Upon conclusion of the hearing and if still of the opinion that the bidder is not fully qualified to perform the work, the head of the purchasing agency or designee shall refuse to receive or consider any offer made by the prospective offeror.

(e) A written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency. The prospective offeror shall be immediately notified of the determination. The

§3-122-117

decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to chapter 3-126.

(f) Within five working days after receipt of the final decision by the head of the purchasing agency, the prospective offeror shall inform the head of the purchasing agency in writing, if an administrative appeal will be filed within seven calendar days after receipt of final decision.

(g) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

[Eff 12/15/95; am and comp] (Auth: HRS
§§103D-202, 103D-310, 103D-318) (Imp: HRS §§103D-310,
103D-318)

§§3-122-111 to 3-122-115 (Reserved).

SUBCHAPTER 14

PREQUALIFICATION OF SUPPLIERS

§3-122-116 Conditions for prequalification of suppliers. Prequalification of suppliers for particular types of goods, services, and construction shall be allowed under the following conditions:

- (1) To limit a solicitation to those vendors who meet statutory or licensing requirements applicable to the solicitation;
 - (2) To minimize the time necessary to verify vendor qualifications which otherwise would jeopardize timely award of contracts.
- [Eff 12/15/95; comp] (Auth:
HRS §§103D-202, 103D-311) (Imp: HRS
§103D-311)

§3-122-117 Prequalification of suppliers. Prospective suppliers may also be prequalified and listed for a particular type of good, service, or construction. However, the following stipulations shall be made with regards to the list:

- (1) Distribution of the solicitation shall not be limited to only prequalified suppliers;
 - (2) A prospective supplier shall not be denied
- §3-122-117

award of a contract simply because the supplier was not prequalified;

- (3) The fact that a prospective supplier has been prequalified does not necessarily represent a finding of responsibility; and
- (4) The fact that a prospective supplier has been prequalified does not necessarily represent product acceptability. [Eff 12/15/95;

§§3-122-118 to 3-122-120 (Reserved).

SUBCHAPTER 15

COST OR PRICING DATA

§3-122-121 Scope and application. This subchapter sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this subchapter requiring submission of cost or pricing data do not apply to small purchases or to a contract let by competitive sealed bidding or multi-step bidding. However, cost or pricing data may be required under a contract let by competitive sealed bidding when price adjustments are subsequently made to the contract pursuant to section 3-122-123 and, to this extent, those provisions would apply. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-122 Cost or pricing data defined. Cost and pricing data means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of a prospective contractor's judgment about future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all facts that can

§3-122-123

reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include factors as:

- (1) Vendor quotations;

- (2) Nonrecurring costs;
- (3) Information on changes in production methods and in production or purchasing volume;
- (4) Data supporting projections of business prospects and objectives and related operations costs;
- (5) Unit cost trends as those associated with labor efficiency;
- (6) Make or buy decisions;
- (7) Labor union contract negotiations; and
- (8) Information on management decisions that could have a significant bearing on costs.
[Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-123 Requirement for cost or pricing data.

Cost or pricing data are required to be submitted in support of a proposal when:

- (1) Any contract expected to exceed \$100,000 is to be awarded by competitive sealed proposal, sole source procurement, or the procurement of professional services pursuant to subchapter 7;
- (2) Adjusting the price of any contract, including a contract awarded by competitive sealed bidding, whether or not cost or pricing data were required in connection with the initial pricing of the contract, if the adjustment involves both aggregate increases and decreases in costs plus applicable profits expected to exceed \$100,000. However, this requirement shall not apply when unrelated and separately priced adjustments for which cost or pricing data would not be required if considered separately are consolidated for administrative convenience;
- (3) An emergency procurement is made in excess of \$100,000; however, data may be submitted after contract award; or
- (4) The procurement officer makes a written determination that the circumstances warrant

§3-122-123

requiring submission of cost or pricing data provided, however, cost or pricing data shall

made pursuant to competitive sealed bidding.
However, generally cost or pricing data
modification is less than \$25,000. Moreover,
example; analysis of only specific factors
will provide a reasonable pricing result on
of complete cost or pricing data, the
procurement officer shall request only that
limited extent of the cost analysis needed
and need not require certification. [
12/15/95; comp (Auth: HRS
103D-202) (Imp: HRS 103D-312)

3 - Exceptions to the requirement for cost
(a
be submitted or certified where the contract price is

(1)

herein:

or proposals are solicited and at least two
offerors independently compete

responsible
evaluated price by submitting priced offers,
requirements of the solicitation. A price is
contract results directly from price
met, price competition shall be presumed to
determines in writing that the competition is

(2)

catalogue prices or market

(A)

price included in a catalogue, price
regularly maintained by a manufacturer

§

otherwise available for inspection by customers; and states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general (non-government) buying public for the goods or services involved.

(B) "Established market price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

(3) Prices set by law or regulation, as defined herein:

The price of a good or service is set by law or rule if some governmental body establishes the price that the offeror or contractor may charge the State and other customers.

(b) If, despite the existence of an established catalogue price or market price, and after consultation with the prospective contractors, the procurement officer considers that the price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured and those listed in the catalogue or market, requests should be so limited.

(c) When the chief procurement officer or the head of a purchasing agency determines in writing to waive the applicable requirements of paragraphs (1), (2), or (3) in section 3-122-123 for submission of cost or pricing data in a particular pricing action and the reasons for the waiver are stated in the determination.

A copy of the determination shall be kept in the contract file and made available to the public upon request.

(d) If after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be certified.

(e) The determinations required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.
[Eff 12/15/95; am and comp] (Auth: HRS
§3-122-123

103D-202, 103D-312, 103D-318) (Imp: HRS 103D-312,
103D-318)

3-122 125 Submission of cost or pricing data and

_____ (a) When cost or pricing data are

officer prior to beginning price negotiations at any
reasonable time and in any reasonable manner prescribed

officer requires the offeror or contractor to submit

data shall either be actually submitted or specifically
identified in writing.

) The offeror or contractor is required to keep
concluded.

(c offeror or contractor shall certify as
soon as practicable after agreement is reached on price

complete, and current as of the date of reaching
agreement on price.

) A refusal by an offeror to supply the
procurement officer or the head of a purchasing agency,
whose duty shall be to determine in writing whether to
noncomplying bidder or offeror, to defer

the contract. A refusal by a contractor to submit the

referred to the chief procurement officer or the head
of a purchasing agency who shall determine in writing

not to allow any price adjustment, or to set the amount
of the price adjustment, subject to the contractor's

-126. [

comp] Auth: HRS § -202) (Imp:
HRS 103D-312)

3-122 126 Certificate of current cost or pricing

_____ (a) When cost or pricing data must be

data form provided by the policy board shall be
included in the contract file along with any award

offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is

§3-122-127

reached on the contract price or adjustment.

(b) Although the certificate pertains to "cost or pricing data," it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A certificate of current cost or pricing data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

(c) Whenever it is anticipated that a certificate of current cost or pricing data may be required, notice of this requirement shall be included in the solicitation. If a certificate is required, the contract shall include a clause giving the State a contract right to reduction in the price as provided herein.

(d) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

[Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-127 Defective cost or pricing data. (a) If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or not current as of the date stated in the certificate, the State is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced by the amount. In establishing that the defective data caused an increase in the contract price, the procurement officer is not expected to reconstruct the negotiation by speculating as to what

parties if the correct data had been submitted at the time of agreement on price.

) In determining the amount of a downward adjustment, the contractor shall be entitled to an
3-122-127

offsetting adjustment for any understated cost or

for the same pricing action up to the amount of the State's claim for overstated cost or pricing data

(c) If the contractor and the procurement officer pricing data or amount of adjustment due to defective cost or pricing data, the procurement officer shall set

subchapter and the contractor may appeal this decision as a contract controversy under chapter 3

[Eff 12/15/95;] Auth: HRS

103D § -312)

3 - Cost analysis techniques.
analysis includes the appropriate verification of cost

- (1) direct labor, indirect costs, direct costs, and fixed fee or profit;
The necessity for certain costs
- (3) the necessary costs
- (4) contingencies;
The basis used for allocation of indirect ;
The appropriateness of allocations of contract; and
The reasonableness of the total cost or
Eff 12/15/95;
(§ -202) (Imp: HRS 103D

§ -122 129 _____ (a
analysis is used to determine if a price is reasonable

and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

- (1) Price submissions of prospective bidders or offerors in the current procurement;
- (2) Prior price quotations and contract prices charged by the bidder, offeror, or

§3-122-133

contractor;

- (3) Prices published in catalogues or price lists;
- (4) Prices available on the open market; and
- (5) In-house estimates of cost.

(b) In making the analysis, consideration must be given to any differing terms and conditions. [Eff 12/15/95; comp] (Auth: HRS §103D-202)
(Imp: HRS §103D-312)

§3-122-130 Evaluation of cost or pricing data.

Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent state price and cost estimates. They shall also include consideration of whether the costs are reasonable and allocable under the pertinent provisions of chapter 3-123. [Eff 12/15/95; comp]
(Auth: HRS §103D-202) (Imp: HRS §103D-312)

§§3-122-131 to 3-122-132 (Reserved).

SUBCHAPTER 16

TYPES OF CONTRACTS

§3-122-133 Restrictive or prohibitive use of certain types of contracts. (a) Subject to the limitations of this section, any type of contract that will promote the purchasing agency's best interests may be used, except that cost-reimbursement and cost-plus-a-percentage-of-cost contracts are:

(1) officer determines in writing that the contracts are likely to be less costly than impracticable to obtain the goods, services, or construction required except by means of

(2) Prohibited if their use would jeopardize the reduce the amount of the assistance under any applicable federal statute or regulation.

) Award of a cost-plus -percentage-of

§3-122-133

(1) Notice is given to the head of the compliance of the house of representatives, and the chairpersons of the senate ways and means and

(2) Notice is conspicuously posted in an area procurement officer and available for public inspection during normal business hours.

The determinations required by this section shall be final and conclusive unless they are clearly

[Eff 12/15/95; am and] (§§103D-202, 103D-313, 103D-318) (Imp: HRS 103D-313, 103D-318)

3-122 134 Selection of contract types.) The selection of an appropriate contract type depends on

(1) The nature of the goods, services, or

(2) The uncertainties which may be involved in

(3) The extent to which the purchasing agency or cost of performance of the contract; and

(4) ility assumed by the contractor.

) The objective when selecting a contract type is to obtain the best value in needed goods, services,

or construction in the time required and at the lowest cost or price to the purchasing agency.

- (1) To achieve this objective, the procurement officer, before choosing a contract type, should review the elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance.
- (2) Factors to be considered in selecting any type of contract include, but are not limited to:
 - (A) The type and complexity of the good, service, or construction item being procured;
 - (B) The difficulty of estimating performance costs as the inability of the agency to

§3-122-135

develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirement of the contract;

- (C) The administrative costs to both parties;
- (D) The degree to which the purchasing agency must provide technical coordination during the performance of the contract;
- (E) The effect of the choice of the type of contract on the amount of competition to be expected;
- (F) The stability of material or commodity market prices or wage levels;
- (G) The urgency of the requirement; and
- (H) The length of contract performance.

[Eff 12/15/95; comp]

(Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-135 Types of contracts. (a) Contract types described below are the principal contract types and any other type not described may be used, subject to the prohibition and restriction in section 3-122-133.

(b)
following and a type of contract may be a combination
of any of the following:

Compensation, which includes:

- (A) -price contract, pursuant to
section 3 -136, as follows:
 - (i) Firm fixed-price c
 - (ii) Fixed
adjustment.
- (B) -reimbursement contract, pursuant to
section 3 -137, as follows:
 - (i) Cost contract without fee;
Cost-plus
completion form type or the term
form type; and
Cost-plus -percentage-of
contract.

(2)

to reduce total costs of performance, which
includes:

3-122-135

- (A) -incentive contract, pursuant to
section 3 -138, as follows:
 - (i) Fixed-pr
contract; and
 - (ii) -reimbursement contract with
cost incentive fee.

Performance incentive, pursuant to section
3 -139;

(4)

3-122

- (5) Labor hour, pursuant to section 3 -141;
Quantity, which includes:

Definite quantity contract, pursuant to
section 3 -142; and

- (B) includes requirements contract, pursuant
to section 3 -143.

(7)

under which it is either necessary or
advantageous to award a contract to more than

solicitation, or for similar items, which
includes:

Incremental award contract of a definite
-122-144;

- (B) Multiple award contract of an indefinite quantity, pursuant to section 3-122-145; and
 - (C) Geographic or regional award contract, pursuant to section 3-122-146.
 - (8) Passing of title, which includes lease contracts, pursuant to section 3-122-147;
 - (9) Installment purchase payments, pursuant to section 3-122-148; and
 - (10) Length of contract, which includes multi-term contracts, pursuant to section 3-122-149.
- [Eff 12/15/95; am and comp]
 (Auth: HRS §§103D-202, 103D-313, 103D-322)
 (Imp: HRS §§103D-313, 103D-315, 103D-322)

§3-122-136 The fixed-price contract. (a) The fixed-price contract is the only type of contract that can be used in competitive sealed bidding. It places responsibility on the contractor for the delivery of the goods or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to

§3-122-136

contractually specified adjustments. It is appropriate for use when the extent and type of work necessary to meet the purchasing agency's requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case of construction or standard commercial products.

(b) The firm fixed-price contract is one type of fixed-price contract. It provides a price that is not subject to adjustment due to variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the purchasing agency can be established at the outset. Bases upon which firm fixed prices may be established include:

- (1) Adequate price competition for the contract;
- (2) Comparison of prices in similar prior procurement in which prices were fair and reasonable;
- (3) Establishment of realistic costs of performance by utilizing available cost or price data and identifying certainties in contract performance; or

(4)

firm price.

(c) -price contract with price adjustment is another type of fixed provides for variation in the contract price under special conditions defined in the contract, other than

to modifications to the work. The formula or other basis by which the adjustment in contract price can be

resulting contract. Adjustment allowed may be upward or downward only or both upward and downward.

) Examples of conditions under which adjustments may be provided are:

In fixed-priced contracts:

(A)

agreement rates as supplied to industry or area wide; or
Changes due to rapid and substantial price fluctuations, which can be related

(2) In req

(A) When a general price change applicable

(B) When a general price change alters the

§3-122-136

discount is applied pursuant to the contract to determine the contract
Eff 12/15/95;

comp (Auth: HRS
103D-202, 103D-313) (Imp: HRS
103D-313)

3-122-137 _____ (a)

122-133, provides for payment to the contractor of allowable costs incurred in the performance of the

and as provided in the contract.

(b)

cost for the performance of the contract and a dollar ceiling which the contractor may not exceed, except at

addition, may provide for payment of a fee.

) It has a provision whereby the contractor agrees to perform as specified in the contract until specified ceiling, whichever occurs first.

(d) involved in contract performance are of the magnitude that the cost of contract performance cannot be

by use of any type of fixed-price contract.

) It necessitates appropriate monitoring by agency personnel during performance so as to give

contract are being met.

(f) development, and study type contracts.

(g) that:

- (1) purchasing agency than any other type or that it is impracticable to obtain otherwise the
- (2) The proposed contractor's ac will permit timely development of all necessary cost data in the form required by
- (3) The proposed contractor's accounting system

§3-122-137

principles.

(h) cost-reimbursement contract which provides that the incurred in performing the contract but will not receive a fee.

i) The cost -fixed fee contract is another type of cost

- (1) It an agreed fixed fee in addition to reimbursement of allowable incurred costs.

contract award and does not vary whether or not the actual cost of contract performance

is fixed but not the contract amount because the final contract amount will depend on the subject to adjustment only if the contract is modified to provide for an increase or the contract.

(2)

form.

(A) on form is one which describes the scope of work to be done

definite goal or target expressed and with a specified end
This form of cost-plus contract normally requires the contractor to complete and deliver the -product as a condition for payment of the entire fixed established for the work and within the estimated cost if possible. However, in

within the estimated cost, the agency can elect to require more work and

increase in fee provided it increases the estimated cost.

The term form is one which describes the terms and which obligates the contractor to devote a specified level of effort

3-122-137

for a stated period of time. The fixed

agreed period of time. Payment is contingent upon certification that the

effort specified in the contract in performing the work called for and that

satisfactory by the purchasing agency.

(C)

cost-plus preferred over the term form whenever the following can be defined with

sufficient precision to permit the development of estimates within which prospective contractors can reasonably be expected to complete the work:

- (i) The work itself; or
 - (ii) Specific milestones which are definable points in a program when certain objectives can be said to have been accomplished.
- (D) In no event should the term form of the cost-plus-fixed fee contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time.

(j) The cost-plus-a-percentage-of-cost contract is another type of cost-reimbursement contract. Its use is restricted or prohibited, pursuant to section 3-122-133. Prior to completion of the work, the parties agree that the fee will be a predetermined percentage of the total cost of the work. The contract provides incentive for the contractor to incur cost at the expense of the State since the more the contractor spends, the greater its fee. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-138 The cost-incentive contract. (a) The cost-incentive contract provides for the reimbursement to the contractor of allowable costs incurred up to the ceiling amount and establishes a formula whereby the contractor is rewarded for performing at less than target costs or is penalized if it exceeds target cost.

(b) The profit or fee under the contract will
§3-122-138

vary inversely with the actual, allowable costs of performance and consequently is dependent on how effectively the contractor controls cost in the performance of the contract.

(c) The fixed-price cost incentive contract is one type of cost incentive contract. The parties establish at the outset a target cost, a target profit, a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the

122-93

efficiently manage the contract than a cost-plus-fixed-fee contract provides.

(e) Prior to entering into any cost incentive contract, or any cost-reimbursed contract with cost incentive fee, the procurement officer shall make the written determination required by section 3-122-137(g).

[Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-139 Performance incentive contract. (a)

In a performance incentive contract, the parties establish at the outset a pricing basis for the contract, performance goals, and a formula which varies the profit or the fee if the specified performance goals are exceeded or not met.

(b) For example, early completion may entitle the contractor to a bonus while later completion may entitle the State to a price decrease. [Eff 12/15/95; comp] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-140 Time and materials contract. (a) A

time and materials contract provides an agreed basis for payment for materials supplied and labor performed.

(b) It shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior agency approval.

(c) A time and materials contract shall be entered into only after the procurement officer determines in writing that:

- (1) Agency personnel have been assigned to closely monitor the performance of the work; and
- (2) In the circumstances, it would not be practicable to use any other type of contract to obtain needed goods, services, or construction, in the time required, and at the lowest cost or price to the purchasing agency. [Eff 12/15/95; comp]

§3-122-143

(Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§ -122- Labor hour contract. (a
hour contract provides only for the payment of labor
performed.

) It shall contain the same ceiling as provided
in subsection 3 -140(b).

(c
procurement officer shall make the determination as
required in subsection 3 -140(c). [Eff 12/15/95;
] (§§103D-202, 103D 3)
(Imp: HRS 103D-313)

3-122 142 Definite quantity contract.
definite quantity contract is a type of fixed-price
quantity of goods or services either at specified times
or when ordered. [comp]
Auth: HRS §§ -313) (Imp: HRS § -313)

§ -122- Indefinite quantity contract. (a
indefinite quantity contract is a type of fixed-price
to be furnished at specified times, or as ordered.

(b
contract:

- (1)
best information available as to quantity.
- (2)
agency is obligated to order and may also
provide for a maximum quantity provision that
order.

(c
indefinite quantity contract for goods or services that
obligates the purchasing agency to order all the actual
period of time, and for the protection of the
purchasing agency and the contractor, may include the

- (1) A
agency and any other users named in the
solicitation to order their actual

§3-122-143

- (2) A provision to reserve the right to take bids separately if a particular quantity requirement arises which exceeds the purchasing agency's normal requirements or an amount specified in the contract.

(d) An exemption from ordering under a requirements contract may be granted when the chief procurement officer, head of the purchasing agency, or a designee approves a finding that the good or service under the contract will not meet the needs of the purchasing agency. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-144 Incremental award contract. (a) An incremental award contract is a type of a definite quantity contract resulting from conditions under which it was either necessary or advantageous to award a contract to more than one supplier for the same item on a solicitation, or for similar items.

(b) An incremental award contract is a contract based on an award of portions of a definite quantity requirement to more than one contractor, and each portion is for a definite quantity and the sum of the portions is the total definite quantity required.

(c) This type of contract may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery dates.

(d) If this type of contract is anticipated prior to issuing a bid or proposal, the State shall reserve the right to make an incremental award and the criteria for award shall be stated in the bid or proposal and the bid or proposal shall provide for separate-item bids on less than the full quantity or the total delivery.

(e) Evaluation and award shall be made by accepting prices and deliveries beginning with the most economical and progressing to higher offers until the full requirements are committed at the lowest overall cost available.

(f) Competitive sealed bidding, subchapter 5, is the conventional procurement method for establishing this type of contract, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used if appropriate as determined

§3-122-145

(g) The procurement officer shall make a written incremental award, which shall be made a part of the procurement file. [comp] Auth: HRS §§ -322)
(Imp: HRS 103D-322)

3-122 145 Multiple award contract.) A multiple award contract is a contract resulting from an more similar goods or services to more than one bidder or its actual requirements for the specified goods or services from those contractors.

) Multiple awards may be made when award to two or more bidders or necessary for adequate quantity delivery, service, or product compatibility.

) Multiple awards shall not be made:

- (1) needs without sacrifice of economy or service;
For the purpose of dividing the business;
For making available product or supplier selection to allow for user preference

- (4) For avoiding the resolution of tie bids.

) Multiple awards shall be limited to the least number of suppliers necessary to meet the valid

(e) Competitive sealed bidding, subchapter 5, is the contracts, although competitive sealed proposals, small purchase procedures, and emergency procurements with subchapters 6, 8 and 10.

) All eligible users of the contract shall be named in the bid or proposal, and it shall be mandatory met under the contract be obtained in accordance with the contract, provided, that:

The State shall reserve the right to take bids separately if a particular quantity

requirement or an amount specified in the contract;

- (2) The State shall reserve the right to take bids separately if the chief procurement officer or the head of a purchasing agency approves a finding that the goods or services available under the contract will not meet a nonrecurring special need of the State; and
- (3) The contract shall allow the using agencies to procure goods produced, or services performed, incidental to the State's own programs, as correctional industries, when the goods or services satisfy the need.
- (g) If a multiple award is anticipated prior to issuing a bid or proposal, the State shall reserve the right to make the award and the criteria for award shall be stated in the bid or proposal.
- (h) The procurement officer shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement file.
- (i) A multiple award contract may also be awarded through a single competitive solicitation on a geographic or regional basis, pursuant to section 3-122-146. [Eff 12/15/95; am and comp]
(Auth: HRS §§103D-202, 103D-322) (Imp: HRS §103D-322)

§3-122-146 Geographic or regional award contract.

- (a) Geographic or regional award contract is a type of multiple-award contract made when goods or services are required to widely scattered locations or a particular requirement is of a local nature.
- (b) Geographic regions may include:
 - (1) Oahu as region 1, and further subdivided into leeward 1A, central Oahu-lower 1B, central Oahu-upper 1C, and windward 1D.
 - (2) Maui as region 2, Hawaii as region 3, Kauai as region 4.
 - (3) Those vendors that can provide goods, services, or construction anywhere in the State would be identified as region 5, or they may select one or more of the regions in paragraphs (1) and (2) depending on their capabilities.
- (c) Geographic purchasing can be advantageous, or even necessary, for a number of reasons related to cost

of transportation in terms of cost of the product or to firms located in the area involved and to firms which

§

serve that area.

(d) however, where a larger contract can satisfy agencies requirements by more effective competition and at lower

(e) If a regional award is anticipated prior to right to make the award and the criteria for award shall be stated in the solicitation.

) The procurement officer shall make a written determination setting forth the reasons for a regional

file. [Eff 12/15/95;] (§§103D -322) (Imp: HRS §§ -322, 103D-904)

3-122 147 Lease contract.) A lease is a contract for the use of goods under which title does

(b) A lease may be entered into provided:
It is in the best interest of the purchasing agency

(2) All conditions for renewal and costs of

(3) The lease is not used to circumvent normal

(c) The following lease arrangements are subject

(1) Where the total expenditure for a lease for

(2) Where a lease agreement contains an option to

option including lease or rental payments is \$25,000 or more; or
Where total expenditure for a multi-year

total annual expenditure is less than \$25,000.

) When the lease arrangement is subject to the formal bid or proposal process and an option to

provision shall be included in the solicitation. The

provision shall provide that to exercise the option is at the purchasing agency's discretion only, and not subject to agreement or acceptance by the contractor. Before exercising the option the procurement officer shall:

(1) Investigate alternative means of procuring
§3-122-147

- comparable goods; and
- (2) Compare estimated costs and benefits associated with the alternative means and the exercise of the option, for example, the benefit of buying new state-of-the-art goods compared to the estimated, initial savings associated with exercise of a purchase option. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-148 Installment purchase payment contract.

(a) Goods contracts may provide for purchase payments, including interest charges, over a period of time.

(b) Installment payments should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the head of the purchasing agency.

(c) Heads of purchasing agencies shall be responsible for ensuring that statutory or other prohibitions are not violated by use of installment provisions and that all budgetary, funding, or other required prior approvals are obtained.

(d) When used, a provision for installment payments shall be included in the solicitation document. [Eff 12/15/95; comp] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-149 Multi-term contract. (a) The objective of the multi-term contract is to encourage effective competition or otherwise promote economies in procurement.

(b) This section applies to contracts for goods and services and does not apply to other contracts including, but not limited to, contracts for construction and leases, including leases of real property.

(c) A multi-term contract extends over more than one fiscal period but funds are available for only the initial fiscal period, and the contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds therefor. Pursuant to subsection 3-122-102(c), certification of a portion of the total funds required for a contract may be permitted when an immediate solicitation will result in a significantly

§3-122-149

more favorable contract terms and conditions to the State than a solicitation made at a later date; provided that certification for partial funding shall be permitted only if the respective chief financial officer, as the case may be, states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues.

(d) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of goods or services delivered under the contract.

(e) Multi-term contracts may be considered:

(1) Where the performance of the services involves:

(A) High start-up costs; for example, a student transportation contract where the contractor would have to buy buses and other equipment solely to meet the State's requirements but the equipment would have useful life in excess of one year; or

(B) Where a changeover of service contractors involves both high phase-in and high phase-out costs during a transition period;

(2) Where there is a requirement for definite quantities of goods for more than one fiscal period and the production process requires alteration in the contractor's facilities or the operation involves high start-up costs;

(3) When firms not willing or able to compete because of high start-up costs or capital

investment in facility expansion will be encouraged to participate in the competition because of assurance of recouping the costs during the period of contract performance;

- (4) When lower production costs because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;
- (5) When stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or

§3-122-149

- (6) When the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

(f) A multi-term contract may be entered into for any period of time deemed to be in the best interests of the governmental body, provided the head of the purchasing agency determines in writing that:

- (1) The contract will serve the best interest of the governmental body by encouraging effective competition or otherwise promoting economies in procurement;
- (2) The estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- (3) Sufficient funds to pay for the initial term of the contract are available and the funds necessary for the remaining terms of the contract are likely to be available from sources which are identified in writing.

(g) The solicitation for a multi-term contract shall state:

- (1) The term of the contract and conditions for renewal or extension, if any;
- (2) That funds are available for only the initial term of the contract, and the contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds therefor;
- (3) The amount of goods or services required for the proposed contract period;
- (4) That a unit price shall be given for each good or service, and that the unit prices

shall be the same throughout the contract,
except to the extent price adjustment is
;

- (5) funds are not appropriated or otherwise made
available to support continuation of

the initial term of the contract; however,
this does not affect either the State's

termination clause of the contract;

- (6) he head of the purchasing agency must
notify the contractor on a timely basis that

continuation of the contract for each

§

succeeding fiscal period;

- (7) offerors may submit prices
for:

The initial term of the contract only;
The entire time of performance only; or

- (C) first initial term and the
entire time of performance;

How the award will be determined including,
if prices for the initial term of the

are submitted, how the prices will be
compared; and

That, in the event of cancellation as
provided in paragraph (5), the contractor
unamortized,

reasonably

- (h) A cancellation, as used in multi
contracting, means the cancellation of the total
requirements for the remaining portion of the contract

available.

- (1) -term contract shall
result when the head of the purchasing

- (A) Notifies the contractor of

performance for any fiscal period
subsequent to the first; or
Fails to notify the contractor that
funds are available for the succeeding

fiscal period or that funds which may be used for the contract have not been appropriated or otherwise made available, by the date set forth in the contract, unless the parties agree to extend the date.

- (2) This subsection does not limit the rights of the State or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this subsection. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-315)

§§3-122-150 to 3-122-154 (Reserved).

§3-122-155

SUBCHAPTER 17

APPROVAL OF ACCOUNTING SYSTEM

§3-122-155 Approval of accounting system. (a) Except with respect to firm fixed-price contracts, no contract shall be used unless it has been determined in writing by the chief procurement officer, the head of a purchasing agency, or a designee of either officer that:

- (1) The proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
- (2) The proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

(b) The determination required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-318) (Imp: HRS §§103D-314, 103D-318)

SUBCHAPTER 18

RIGHT TO INSPECT PLANT

3-122 166 Inspection of plant or site.
Circumstances under which the State may perform inspections include, but are not limited to,

to determine:

- (1) 3-122
being met; and
- (2) accordance with its terms. [Eff 12/15/95;
] (§103D
(Imp: HRS § -316)

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§3 -167 Access to plant or place of business.

a contractor, subcontractor, vendor, material supplier, or a professional

- (1) Inspect goods or services for acce
the State pursuant to the terms of a
contract
- (2) Audit cost or pricing data or audit the books
-122-175;
- (3) Investigate in connection with an action to
for award of contracts pursuant to sections
3 -11 through 3-126 Eff 12/15/95; am
and] (
§103D §103D

§3 -168 _____
services. (a
State may inspect supplies and services as required at
any site or facility and perform tests to determine
after award, to contract requirements, and are

therefore acceptable. The inspections and tests shall be conducted in accordance with the terms of the solicitation and contract.

(b) The chief procurement officer may establish operational procedures governing the testing and trial use of equipment, materials, and other supplies by any state agency, and the application of resulting information and data to specifications or procurements.

[Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-169 Conduct of inspections. (a)

Inspections or tests shall be performed so as not to unduly delay the work. The presence or absence of an inspector shall not result in the waiver of any requirements of the contract, nor shall any act, statement or omission by an inspector constitute or be deemed a change unless the procedure for changes is followed.

(b) When an inspection is made in a plant or place of business, the contractor or subcontractor shall provide without charge, all reasonable facilities and assistance for the safety and convenience of the §3-122-169

person performing the inspection or testing.

(c) Inspection or testing of supplies and services performed at a plant or place of business shall be performed at reasonable times. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-170 Inspection of construction projects.

On-site inspection of construction shall be performed in accordance with the terms of the contract. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§§3-122-171 to 3-122-174 (Reserved).

SUBCHAPTER 19

RIGHT TO AUDIT RECORDS

§3-122-175 Statutory authority to audit.

Pursuant to section 103D-317, HRS, the State may, at reasonable times and places, audit the books and records of a contractor, prospective contractor, subcontractor, or prospective subcontractor which are related to:

- (1) The cost or pricing data submitted under sections 3-122-122 through 3-122-130;
- (2) A state contract, including subcontracts, other than a firm fixed-price contract, awarded pursuant to subchapters 5 through 10; and
- (3) Any claim for additional compensation or for changes. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-176 Auditors' audit reports.

Audits requested under this subchapter shall be performed by the office of the chief procurement officer, the head of a purchasing agency, the attorney general or corporation counsel with legal authority over the procuring agency, or an independent auditor. An audit

§3-122-178

report shall be prepared in accordance with section 3-122-178 or section 3-122-180. Except when the audit is done in response to a claim for additional compensation or in connection with an investigation for criminal conduct or fraud relating to the procurement, the report shall be made available to the party audited upon request. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-177 Cost or pricing data audit.

(a) The chief procurement officer, head of a purchasing agency, the attorney general or corporation counsel with legal authority over the purchasing agency, or a designee of either officer may require an audit of cost or pricing data submitted under section 3-122-125.

(b) An audit should be required when in respect

to the contractor, prospective contractor, subcontractor, or prospective subcontractor, there is:

- (1) A question as to the adequacy of accounting policies or cost systems;
- (2) A substantial change in the methods or levels of operation;
- (3) Previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
- (4) A lack of cost experience due to the procurement of a new supply or service; or
- (5) Other evidence that an audit is in the State's best interests as determined by the chief procurement officer, head of the purchasing agency, the attorney general or corporation counsel with legal authority over the purchasing agency, or a designee of either officer. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-178 Cost or pricing data audit report.

(a) When the chief procurement officer, the head of a purchasing agency, the attorney general or corporation counsel with legal authority over the purchasing agency, or a designee of either officer requires an audit under section 3-122-177, the auditor shall submit a written report to the officer by an agreed upon date.

(b) Subject to final determination by the
§3-122-178

auditor, the report should contain the following in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:

- (1) A description of the original proposal and all submissions of cost or pricing data;
- (2) An explanation of the basis and the method used in preparing the proposal;
- (3) A statement identifying any cost or pricing data not submitted but examined by the auditor which has a significant effect on the proposed cost or price;
- (4) A description of any deficiency in the cost or pricing data not submitted and an explanation of its effect on the proposal;

- (5) A statement summarizing those major points or pricing data submitted; and
- (6) obtained from other sources. [Eff 12/15/95; comp] Auth: HRS § -202) (Imp: HRS § -317)

§ -122- Contract audit. (a authority of section 3-122 under which books and records should be audited is that in which price is based on costs or is subject to

would be appropriate to assure satisfactory performance, as a time and materials contract.

) The requirement of a contract audit may be warranted when a question arises in connection with: The financial condition, integrity, and

subcontractor;

- (2) ;
- (3)

subcontractor's accounting system; The number or nature of invoices or reimbursement vouchers submitted by the

- (5) The use of federal assistance funds
- (6) The fluctuation of market prices affecting
- (7) Any other situation when the officer finds that an audit is necessary for the protection of the State's interest.
-) The scope of the audit may be limited by the

§

chief procurement officer, the head of the purchasing agency, the attorney general or corporation counsel

designee of either officer. [Eff 12/15/95; am and] (§103D

§103D

§3 -180 _____ Where the chief procurement officer, head of a purchasing agency,

audit under section 3-122-179, the auditor shall submit a written report to the officer by an agreed upon date.

The scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the contract to which the audited data relate and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-181 Retention of books and records. (a) Any contractor who receives a contract, change order, or contract modification for which cost or pricing data are required shall maintain the books and records that relate to the cost or pricing data for three years from the date of final payment under the contract.

(b) Books and records that relate to a state contract, including subcontracts, other than a firm fixed-price contract, awarded under any method set forth in section 3-122-175 shall be maintained:

- (1) By a contractor, for three years from the date of final payment under the price contract; and
- (2) By a subcontractor, for three years from the date of final payment under the subcontract. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-182 Sanctions for lack of cooperation. A party or entity that fails to comply or fully cooperate with an authorized audit shall be subject to any and all of the following sanctions:

- (1) Rejection of the claim related to the audit; or

§3-122-182

- (2) Declaration of contractor default or breach of contract; or
- (3) Debarment from future contracts pursuant to section 103D-702, HRS. [Eff and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

SUBCHAPTER 20

§3 -186 _____ The
determinations required by section 103D-318, HRS, shall
erroneous, arbitrary, capricious, or contrary to law.
[comp] Auth: HRS
§ §103D-318)

3-122-187 to 3-122

SUBCHAPTER 21

REPORTING OF

§3 -191 _____ For the
purposes of these rules, an
a practice among bidders or offerors
eliminates competition or restrains trade. An
anticompetitive practice can result from an agreement

submitting collusive offers, or result from illicit
business actions which have the effect of restraining

an improper collective refusal to submit an offer.
Indications of suspected
include, but are not limited to, identical offers,
rotated low offers, sharing of the business, "tie
sales, resale price maintenance, and group boycotts.
[comp] Auth: HRS
§ -202) (Imp: HRS § -319)

§

§3 -192 Independent price determination.
Every solicitation shall provide that by submitting an
offer, the
was independently arrived at without collusion. [Eff

§3-122-193 Detection of anticompetitive practices. In order to assist in ascertaining whether or not an anticompetitive practice may have occurred or may be occurring, the procurement officer should be alert and sensitive to conditions of the market place and will often find it necessary to perform the following, as appropriate:

- (1) Study the pricing history of a good, service, or construction item over a period of time sufficient to determine any significant pricing patterns or changes;
- (2) Review similar state contract awards over a period of time; or
- (3) Consult with outside sources of information, as offerors who have competed for similar state business in the past but who are no longer competing for the business. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-194 Identical bidding and price fixing.

(a) The term "identical bidding" means the submission by offerors of the same total price or the same price on a particular line item. The submission of identical offers may or may not signify the existence of collusion. In some instances, price controls imposed by state or federal governments result in the submission of identical offers. Identical offers for supplies are more likely to occur in the absence of collusion if:

- (1) The supply is a commodity with a well-established market price or a brand name with a "suggested retail price;"
- (2) The quantity being purchased is small in relation to the supplier's total sales;
- (3) Early delivery is required; or
- (4) Transportation expenses are low relative to total costs.

(b) In seeking to determine whether collusion has
§3-122-194

taken place, the procurement officer should view the policies of the bidders or offerors, the structure of f.o.b. shipping point and f.o.b. destination, and the nature of the supply, service, or construction

Identical offers may also result from resale price maintenance

3-122 offerors to fix prices
should also be reported. [
comp] Auth: HRS § -202) (Imp: HRS
§ -319)

§ -122- Other anticompetitive practices.)
The practices which are described in this section and

anticompetitive shall be reported in accordance with section 3 -196.

(b offerors
participating in the collusive scheme submit offers and
offeror. To
aid in determining whether rotation may be occurring,
procurements in which the same offerors have

(c) The practice of resale price maintenance
distributor or a dealer to fix the resale price of a
good. A procurement officer should consider the
offered adhere to an established pattern, as a
published price schedule, and when identical bidding

(d) Sharing of the business occurs where
offerors allocate business among themselves
based on the customers or the territory involved.

potential offeror is not participating in
procurement because a particular state agency, or a
particular territory, has not been allocated to the

(e) "Tie-in" sales are those in which an
attempts to sell one good or service only upon the
condition that the procurement
particular good or service.

(f

§3-122-210

between competitors not to deal with another competitor or not to participate in, for instance, a state procurement until the boycotting competitors' conditions are met by the boycotted competitor or the State. The boycott of a competitor by other competitors may have an effect on the market structure or price of a good, service, or construction item needed by the State. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-196 Reporting suspected anticompetitive practices. The chief procurement officer, in consultation with the respective attorney general or corporation counsel, may develop procedures, including forms, for reporting suspected anticompetitive practices. A procurement officer who suspects that anticompetitive practice has occurred or may be occurring shall follow these procedures. [Eff 12/15/95; am and comp] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§§3-122-197 to 3-122-200 (Reserved).

SUBCHAPTER 22

RETENTION OF PROCUREMENT RECORDS

§3-122-201 Retention of procurement records. All procurement records shall be retained and disposed of in accordance with chapter 94, HRS, and records retention guidelines and schedules approved by the comptroller. [Eff 12/15/95; comp] (Auth: HRS §103D-202) (Imp: HRS §103D-320)

§§3-122-202 to 3-122-210 (Reserved).

SUBCHAPTER 23

RECORD OF PROCUREMENT ACTIONS

§

§3 -211 Record of procurement actions.)
Pursuant to section 103D-321, HRS, the chief

procurements \$25,000 or more made under sections 103D-
102(b)(5), 103D-304, 103D 103D-307 for a

(1) Each contractor's name;
The amount and type of each purchase; and

(3)
construction procured.

(b)
the legislature on an annual basis following the close
of the fiscal year. The record shall be available for

(c) The chief procurement officer shall submit
procurement office by August 15 to be consolidated and
forwarded to the legislature by October 1. [
12/15/95; am and comp (Auth: HRS
103D-202) (Imp: HRS 103D-321)

3-122-212 to 3-122-220 (Reserved).

SUBCHAPTER 24

BONDS

§ 221 General.) The term "bid
security", as used in this subchapter means security

(b) Bid security protects the State against the
offeror to execute the
contract for the work bid or to supply the necessary

(c) A contract performance bond indemnifies the
contractor to perform a contract, in particular a
construction contract, in accordance with the plans and

(d) A contract payment bond guarantees payment

to the contractor or its subcontractors for the work bonded. [Eff 12/15/95; am and comp]
(Auth: HRS §§103D-202, 103D-323, 103D-324) (Imp: HRS §§103D-323, 103D-324)

§3-122-223

§3-122-222 Acceptable bid security, contract performance and payment bonds. (a) Acceptable bid security and contract performance and payment bonds, pursuant to section 103D-302 and 103D-303, HRS, shall be limited to:

- (1) Surety bond underwritten by a company licensed to issue bonds in this State;
- (2) Legal tender; or
- (3) A certificate of deposit; credit union share certificate; or cashier's, treasurer's, teller's, or official check drawn by, or a certified check accepted by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, and payable at sight or unconditionally assigned to the procurement officer advertising for offers. These instruments may be utilized only to a maximum of \$100,000. If the required security or bond amount totals over \$100,000, more than one instrument not exceeding \$100,000 each and issued by different financial institutions shall be accepted.

(b) All documentation provided to the purchasing agency shall contain the original signatures signed in ink. [Eff 12/15/95; am and comp]
(Auth: HRS §§103D-202, 103D-323, 103D-324) (Imp: HRS §§103D-323, 103D-324)

§3-122-223 Bid security. (a) Bid security shall be required for:

- (1) Construction contracts when the base bid including additive alternates is \$25,000 or more;
- (2) Construction contracts less than \$25,000 when the head of a purchasing agency has secured the approval of the chief procurement officer;

Goods and services contracts when the head of a purchasing agency has secured the approval

- (4) F
conditions of the funding requires
performance or payment bonds or both.
) Bid security, when required, shall be in an
amount equal to at least five per cent of the base bid
3-122-223

and additive alternates or in an amount required by the

(c) If a contractor fails to accompany its offer
then be deemed nonresponsive in accordance with the
offeror" in section
3-120-3, except as provided by subsection (d).

) If an offer does not comply with the security
requirements of this subchapter, the offer shall be
nonresponsive, unless the failure to comply
is determined by the chief procurement officer, the

officer, to be nonsubstantial where:

Only one offer is received, and there is not
sufficient time to ;

- (2) t of the bid security submitted,
though less than the amount required by the

difference in the price stated in the next
higher acceptable offer plus an amount to

expenses, including the cost of rebidding
project, resulting from the failure of the
bonded bidder to enter into a contract for

- (3) The bid security becomes inadequate as a
offer or offer modification in accordance
with section 3-122-31, if the
increases the amount of security to required
limits within the time established by the

(e) When it is determined that failure to comply
nonsubstantial, the chief
procurement officer, the head of a purchasing agency,
reasons for that determination in writing and a copy of

the determination shall be kept in the contract file and made available to the public upon request. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-323) (Imp: HRS §103D-323)

§3-122-224 Contract performance and payment bonds. (a) Performance and payment bonds shall be required for:

- (1) Construction contracts when the contract price is \$25,000 or more;

§3-122-225

- (2) Construction contracts less than \$25,000 when the head of the purchasing agency has secured the approval of the chief procurement officer;
 - (3) Goods or services contracts when the head of the purchasing agency has secured the approval of the chief procurement officer; and
 - (4) Federally funded contracts wherein the conditions of the funding requires a performance or payment bond or both.
- (b) The amounts of the performance and payment bonds, when required, shall be as follows:
- (1) For construction contracts, performance and payment bonds shall each be in an amount equal to one hundred per cent of the amount of the contract price;
 - (2) For goods and services contracts, performance and payment bonds shall each be in an amount not to exceed fifty per cent of the amount of the contract price;
 - (3) For contracts where contract price cannot be determined at the time of award, the amounts of the performance and payment bonds shall each be stated in the solicitation; and
 - (4) For federally funded contracts, performance or payment bond or both shall each be in amount required by the terms of the federal funding.
- (c) The performance and payment bonds, if required, shall be delivered by the contractor to the State at the same time the contract is executed. If the contractor fails to deliver the required performance and payment bonds, the contractor's award

shall be cancelled, the contractor shall be subject to a claim for all resulting damages, its bid security shall be enforced, and award of the contract may be made to the next lowest offeror in accordance with subchapter 11." [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-225 Reduction of contract performance and payment bond amounts prior to solicitation. (a) Prior to solicitation, the amounts of a performance bond and a payment bond may be reduced, provided that the chief procurement officer or head of a purchasing agency

§3-122-225

approves a written determination.

(b) For construction contracts only, reduction of performance bond amount shall be limited to not less than fifty per cent of the contract price if, after completing appropriate analysis, it is determined to be less costly or more advantageous to the State to self-insure a part of the performance of the contractor. An analysis may be made for groups of contracts, for example, contracts in excess of \$100 million, or may be made on particular contracts, as the chief procurement officer or the head of a purchasing agency chooses. A copy of the analysis shall be available for public inspection.

(c) For construction contracts only, reduction of payment bond amount shall be limited to not less than fifty per cent of the contract price if a written determination is made that it is in the best interest of the State to do so. Factors to be considered in order to make a determination include, but are not limited to the value and number of subcontracts to be awarded by the contractor and the value of the contract. [Eff 12/15/95; comp] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-226 Reduction of contract performance and payment bond amounts during performance. (a) If permitted by the contract and solicitation, the chief procurement officer or head of a purchasing agency has the discretion to reduce the amount of the performance bond as work is completed but only if the officer

determines in writing that the reduction is in the best interest of the State.

(b) During performance, the chief procurement officer or head of a purchasing agency may reduce the required coverage of the payment bond as payments are made by the contractor. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-227 Payment claims against the bond. (a)

Any person or entity who has furnished labor or material to the contractor for the work provided in the contract, for which a payment bond or a performance and payment bond is furnished under this section, and who has not been paid amounts due before the expiration of a period of ninety days after the day on which the last

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of the labor was done or performed or material was furnished or supplied, for which such a claim is made, may institute an action for the amount, or balance thereof, unpaid at the time of the institution of the action against the contractor or the contractor and its sureties, on the payment bond and have their rights and claims adjudicated in the action, and judgment rendered thereon; subject to the State's priority on the bond.

(b) If the full amount of the liability of the contractor or the contractor and its sureties on the security is insufficient to pay the full amount of the claims, then, after paying the full amount due the State, the remainder shall be distributed pro rata among the claimants.

(c) As a condition precedent to any such suit, written notice shall be given to contractor and surety, within ninety days from the date on which the person did or performed the last labor or furnished or supplied the last of the material for which claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied for whom the labor was done or performed.

(d) The written notice shall be served by registered or certified mailing of the notice, to the contractor and surety, at any place they maintain an office or conduct their business, or in any manner authorized by law to serve summons.

(e) Every suit instituted under subsection (a) shall be brought in the circuit court of the circuit in which the project is located, but no suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied for the work provided in the contract. The obligee named in the bond need not be joined as a party in any suit.

(f) The terms "labor" and "material" have the same meanings in this section as the terms are used in section 507-41. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-228 Bond forms. (a) The required bond forms for bid security, performance, payment, and combination performance and payment bonds shall be in conformance with sections 3-122-221, 3-122-222, and 3-122-227 and shall be as specified by the procurement §3-122-228

policy board and issued by procurement directive.

(b) Certified copies of bonds may be requested and obtained by any person from the State upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original. [Eff 12/15/95; am and comp] (Auth: HRS §§103D-202, 103D-325) (Imp: HRS §103D-325)

§§3-122-229 to 3-122-240 (Reserved).

SUBCHAPTER 25

FISCAL RESPONSIBILITY

§3-122-241 Fiscal responsibility. Every contract modification, change order, or contract price adjustment under a contract shall be subject to prior written certification by the appropriate fiscal officer for funding the project or the contract, as to the effect of the contract modification, change order, or

adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer discloses a resulting increase in the total project budget or the total contract budget, the procurement officer shall not execute or make contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with this section. [Eff 12/15/95; comp] (Auth: HRS §103D-326) (Imp: HRS §103D-326)

Amendments to and compilation of chapter 131, title 3, Hawaii Administrative Rules, on the Summary Page dated October 14, 1997 were adopted on October 14, 1997 following a public hearing held on September 22, 1997 in Honolulu, Hawaii; and via video conference from Honolulu, Hawaii on September 23, 1997 to Hilo, Hawaii; Wailuku, Maui; and Lihue, Kauai; after public notice was given in the Honolulu Star-Bulletin, Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island on August 22, 1997.

They shall take effect ten days after filing with the Office of the Lieutenant Governor.

ROBERT E. OYAMA
Chairperson

Procurement Policy Board

SAM CALLEJO
State Comptroller

APPROVED:

BENJAMIN J. CAYETANO
Governor
State of Hawaii

Dated: _____

Filed

APPROVED AS TO FORM:

Deputy Attorney General

EXHIBIT A

PROCUREMENTS APPROVED FOR COMPETITIVE SEALED PROPOSALS
(06/21/99)

<u>Number</u>	<u>Procurement</u>
1.	For consulting services in the areas of software and telecommunications.
2.	For travel agency services to include air and ground transportation, and lodging services.
3.	For computer software and hardware systems.
4.	For design and build public works projects.

EXHIBIT B

PROCUREMENTS APPROVED FOR SOLE SOURCE
(06/21/99)

The following procurements are not subject to the chief procurement officer's approval:

Sole
Source
Number

Sole Source

1. Rental of booth space for exhibits at conventions and trade shows when organized by a single sponsor.

Criteria: When rental is available only through a single organizer or sponsor of the convention or trade show.

2. For the repair, replacement, installation (connection, activation or hookup), or relocation of public utility company equipment or facilities.

Criteria: When the equipment or facilities are owned or controlled by utility companies such as an electric, telephone, gas, or cable television company.

3. Annual license renewal and maintenance for computer software.

Criteria: When the license renewal and maintenance can be obtained from only a single source, normally the developer of the software.

4. Procurement of computer software conversions, modifications, and maintenance for existing programs from the manufacturer of the software.

Criteria: When the conversion, modification, or maintenance can only be obtained from the manufacturer of the software.

